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APPENDIX

Supreme Court of the United States

OCTOBER TERM, 1967

No. 898

JOHNNY SABBATH, PETITIONER

v.

UNITED STATES, RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 25, 1967
CERTIORARI GRANTED DECEMBER 11, 1967

Supreme Court of the United States

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No. 898

JOHNNY SABBATH, PETITIONER

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IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

February, 1966, Grand Jury—Southern Division

No. 36238-SD

[File endorsement omitted]

UNITED STATES OF AMERICA, PLAINTIFF

vs.

WILLIAM EDWARD JONES, (aka William Dale)
JOHNNY SABBATH, DEFENDANTS

INDICTMENT—Filed March 2, 1966
(U.S.C., Title 21, Section 174;
Smuggling and concealing cocaine)

The Grand Jury charges:

COUNT ONE

On or about February 19, 1966, in San Diego County within the Southern Division of the Southern District of California, defendants WILLIAM EDWARD JONES, also known as William Dale, and JOHNNY SABBATH, knowingly imported and brought approximately one ounce of cocaine, a narcotic drug, into the United States from Mexico, contrary to Title 21, United States Code, Section 173.

[fol. C]

COUNT TWO

(U.S.C. Title 21, Sec. 174)

On or about February 19, 1966, in San Diego County, within the Southern Division of the Southern District of California, defendants WILLIAM EDWARD JONES, also known as William Dale, and JOHNNY SABBATH,

knowingly concealed, and facilitated the transportation and concealment of approximately one ounce of cocaine, a narcotic drug, which, as the defendant(s) then and there well knew, had been imported and brought into the United States contrary to law.

A TRUE BILL

/s/ [Illegible]
Foreman

MANUEL L. REAL
United States Attorney

/s/ [Illegible]
Asst. United States Attorney

[fol. 2]

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

HONORABLE FRED KUNZEL, Judge Presiding

No. 36238-SD-K-Criminal

[File endorsement omitted]

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

vs.

JOHNNY SABBATH, DEFENDANT-APPELLANT

REPORTERS' TRANSCRIPT ON APPEAL—June 16, 1966

MANUEL L. REAL, United States Attorney, For the Plaintiff-Appellee

BY: SHELBY GOTT, Assistant United States Attorney, 325 West F Street, San Diego, California, 92101 293-5610

RICHARD G. TATUS, For the Defendant-Appellant, 1008 Electronics Capital Building, San Diego, California, 92101, 234-0158

[fol. 3] APPEARANCES

MANUEL L. REAL, United States Attorney

BY: SHELBY GOTT, Assistant United States Attorney, For the plaintiff, 325 West F Street, San Diego, California 92101, 293-5610

JOHN J. BRADLEY, For the Defendant Sabbath, 215 West Fifth Street, Los Angeles, California, 90013, 629-2261

* * * *

[fol. 8] MR. BRADLEY: May we approach the Bench, your Honor?

THE COURT: Yes, Mr. Bradley.

(The following proceedings were had at the Bench between Court and counsel with defendant present, outside the hearing of the jury.)

MR. BRADLEY: Your Honor, I previously asked Mr. Gott if there were any recordings that would be used in this case, and he told me no, that the customs agents do not make recordings. I notice in their report that they say that they monitored a conversation and have a recording.

MR. GOTT: I do not recall the discussion, and if I told you there were not any recordings, at the time I believed there weren't any. I do now know after reading this file last night that there were some recordings of conversations. The recordings didn't turn out, as they seldom do, but—

MR. BRADLEY: Well, there certainly are some. You say didn't turn out as they often don't.

MR. GOTT: Well, you are certainly welcome to them.

MR. BRADLEY: Well, are they going to be used?

MR. GOTT: No, they will not be used in this trial.

MR. BRADLEY: Well, that solves it.

* * * *

[fol. 13]

COLLOQUY BETWEEN COURT AND COUNSEL

THE COURT: May it be stipulated, Counsel, that the contents of Exhibit 1 for identification which is a rubber contraceptive is the rubber contraceptive which was taken from the person of William Dale, also known as William Edward Jones, by Customs Inspector Claude Yates on February 19th, 1966—

MR. GOTT: So stipulated.

THE COURT: Just a moment—and that if a chemist were called, the chemist would testify that the contents of [fol. 14] the rubber contraceptive are in fact cocaine?

MR. BRADLEY: So stipulated, your Honor.

THE COURT: Mr. Gott, is that agreeable?
MR. GOTT: That is agreeable.
THE COURT: Is that agreeable with you, Mr. Sabbath?
DEFENDANT SABBATH: Yes, it is, your Honor.
THE COURT: All right.

* * * *

WILLIAM JONES,

called as a witness by and on behalf of the government, having been first sworn was examined and testified as follows:

THE CLERK: Would you please be seated.
State your name, please.
THE WITNESS: William Jones.

DIRECT EXAMINATION

BY MR. GOTT:

Q Mr. Jones, did you return from Mexico to the United [fol. 15] States on or about February 19th, 1966?
A Yes, I did.
Q And when you returned, did you have some sort of a package on your person?
A Yes.
Q And where was that package?
A In my shorts.
THE COURT: May the witness be shown Exhibit 1 to see if that resembles the package that he had, the inner contents of the envelope, please.

(Clerk handed exhibit to the witness.)

BY MR. GOTT:

Q Just look at it and—
A Yes.
Q Now, were you arrested at the port of entry there after this was found on your person?
A Yes, I was.

Q Now, where did you get that package, Exhibit 1 for identification?

A Got it from Johnny.

Q And who is "Johnny"? Do you see him in the courtroom?

A Yes.

Q And which one is he?

A The fellow sitting over there (indicating).

[fol. 16] THE COURT: The record may show he has identified the defendant.

BY MR. GOTT:

Q Now, where did you get this from Johnny?

A Up at the race track.

Q How did you get to Mexico?

A Johnny took me.

Q How were you going to get back to Los Angeles?

A Catch a bus or a plane.

Q And did Johnny tell you what you were to do with Exhibit 1, the package, when you got back to Los Angeles?

A Bring it to him.

THE COURT: Speak up, please.

THE WITNESS: Bring it to him.

BY MR. GOTT:

Q Did you deliver the package to him?

A Yes, I did.

THE COURT: Speak up, would you please?

THE WITNESS: Yes.

THE COURT: All right.

BY MR. GOTT:

Q I will ask the question again. The jury may not have heard your answer.

Did you deliver the package to him?

A Yes, I did.

[fol. 17] Q And when you delivered it, did you go alone or with someone else?

A Four or five officers.

Q And were these customs officers?

A Federal agents, I know. I don't know—yes.

Q Well, is this one of them here, this gentleman here seated at counsel table, Mr. Gore (indicating)?
A Yes.
Q And some other fellows?
A Yes.
Q Where did you deliver it to Johnny at?
A At his house.
Q And do you know what address that is?
A It's on 90th. I'm not sure of the correct number.
Q Prior to delivering it, did you make a phone call to Johnny?
A Yes, I did.
Q And where did you get the number that you called him at?
A It was in my wallet.
Q And did any of the officers listen in on the phone conversation?
A Yes.

(Discussion off the record between Mr. Gott and Mr. Gore out of the hearing of the jury.)

[fol. 18] BY MR. GOTT:

Q Now, when you placed this phone call in the presence of the officers to Johnny, did someone answer on the phone?
A Yes.
Q And did you recognize the voice of the person that answered?
A Yes.
Q And who was that person that answered?
A Johnny.
Q And do you recall now what you said to Johnny and what he said to you at that phone call?
A Well, no, not completely. I remember—I called—I told him I had his thing for him and that I was going to bring it up there.
Q What further did he say if anything?
A I don't remember too well.
Q Well, did he say anything about whether you had trouble getting through the port or anything like that?
A I think so, yes.

Q Did he say whether or not he had been searched or stopped when he came through the port?

A I think so.

Q Now, when you got up to his house there and the officers with you, did you go in his apartment alone, or did you go with someone else?

[fol. 19] A I went alone.

Q And when you got in there, what was said, if anything?

A Well, a lady answered the door. So I asked her was Johnny home, and she said yes, he was back in the bedroom.

So I asked *him* could I speak to him alone. And he come up to the living room. And I told him, here's his thing, and—

THE COURT: Just speak a little slower and keep your voice up, would you please. We have to hear what you are saying.

BY MR. GOTT:

Q You told him—

A He came up to the living room. We came up to the living room. I told him I got his thing, was kidding with him, and I asked him—he thought maybe I'd left town or something like that.

Q You had been delayed a little bit, hadn't you?

A Yes, I had.

* * * *

[fol. 20] BY MR. GOTT:

Q What did he say?

A He said he had been stopped over at, across the border some way, something like that.

Q When you went down with him, how did you go?

A We went in his car.

Q And who drove?

A He did.

Q And what kind of a car was it?

A Sixty-five Cadillac convertible.

Q Do you know what color it was?

A Blue.

Q Had you been in his apartment before on other [fol. 21] occasions?

A Yes, I had.

Q Had you seen this woman that answered the door before?

A No, I hadn't.

Q Had you seen anyone else in the apartment besides Johnny on other occasions?

A Yes, various people at different times.

* * * *

BY MR. GOTT:

Q Now, did there come a time that you did give the thing to Johnny?

A Yes, I gave it to him. As soon as I went in. And he came up to the front room.

Q Now, prior to your entering, had any kind of a radio device been placed on your person?

A Yes, it had.

Q Where was Johnny sitting or standing—Where was he in the room when you gave the thing to him?

A Over by the couch.

Q And did he stand up or sit down then?

[fol. 22] A He sit down on the couch after I give it to him.

Q And where did you sit, if you did?

A In the chair, beside the couch.

Q Is there anything between the chair and the couch?

A Well, they are—the chairs at the end of the couch. It's pretty close together, and there's a table in front of the couch.

Q Now, did the officers come in after that?

A They came in just about at that point.

Q Were you to get anything for bringing this package to Johnny?

A Yes.

Q And what?

A Hundred dollars.

Q Did you get the hundred dollars?

A Too much confusion. Forgot about it.

Q In other words, the officers' coming in sort of interrupted your collecting your money?

A Yes.

MR. GOTT: Nothing further, your Honor.

THE COURT: Mr. Bradley?

MR. BRADLEY: Yes, your Honor.

CROSS EXAMINATION

BY MR. BRADLEY:

* * * *

[fol. 27] Q What day was it that you received this package from Johnny in Mexico?

[fol. 28] A Saturday night, I think? I'm not sure definitely.

Q Was it in the daytime or the evening?

A In the evening.

Q It wasn't in the afternoon?

A No.

Q And where were you at this time in Mexico?

A I was in Mexico. Up at the race track.

Q Was anybody else with you—

A No.

Q —other than Johnny?

A No.

Q You traveled to Mexico in his automobile?

A Yes, I did.

Q After you arrived in Mexico, where did Johnny drive the automobile?

A He drove it to the parking lot on the race track.

Q After you crossed the border, he drove directly to a parking lot at the race track?

A Yes.

Q And what did you do then?

A I sat in the car.

Q And what happened then?

A He got out and went over there, back by the hotel.

Q He left you sitting in the car?

A Yes.

[fol. 29] Q And then what happened?
A He come back and give me the package.
Q And then what happened?
A Then he left.
Q Did you go in the race track?
A Yes.
Q Alone?
A Yes.
Q And Johnny left?
A Yes.
Q Drove his car away?
A Yes.
Q And did you see him again in Mexico?
A No.
Q When did he agree to give you the hundred dollars to bring this package back to the United States?
A Just before we left Los Angeles.
Q Was that at your suggestion or at his suggestion?
A Well, it's not exactly—I wouldn't say it was his suggestion, I wouldn't say it was my suggestion. I was telling him about my bad luck and the condition I was in. He told me to come on, go with him; he might could help me out a little bit.
Q Did he tell you where he was going?
A Yes.
[fol. 30] Q What did he say?
A Said he's going to Tijuana.
Q And did he tell you he had been there before?
A No, he didn't.
Q Did you ask him if he had been there before?
A No. I don't, I don't recall whether I did or not.
Q Did you ask him why he was going to Tijuana?
A No.
Q But he was going to help you out?
A Yes.
Q Going to help you out by playing the dog races?
A No, he wasn't going to help me out by playing the dog races.
Q Did you ask him how he was going to help you out?
A Yeah—well, he told me.
Q He what?

A He finally told me.
Q Well, what did he say?
A He told me he wanted me to bring something back for him.
Q And what did you say to that?
A I think I asked him what. I can't remember the complete conversation.
Q You only think you asked him what?
A Well, I'm almost sure I would have asked him what.
[fol. 31] Q Well, what did he say?
A I can't definitely say.
Q Will you repeat that again?
A I cannot definitely say.
Q Well, tell us to the best of your recollection.
A I think he said a package.
Q A package?
A Yes.
Q Did you ask him what was going to be in the package?
A I'm almost sure I did, yes.
Q Well, what did he say to that?
A I think he said cocaine.
Q Cocaine?
A Yes.
Q Now, do you know Johnny's address?
A I know his house.
Q You don't know his address?
A No, I don't.

* * * *

[fol. 34] Q Then when you got to the apartment, and you saw Johnny, who had offered you a hundred dollars —You didn't even ask him for the hundred dollars, did you?
A No, I really didn't.
Q You forgot all about it?
A Yes, I forgot it.
Q Now, you didn't come up to the customs officers and tell them that you were, wanted to perform some civic duty and report to them that Johnny had offered you a hundred dollars to bring this package to him, did you?

A No, I didn't. Not, not—no, I didn't walk up to them and say that, no.

Q They stopped you, didn't they?

A Yes, they did.

[fol. 35] Q You didn't tell them you had any package of cocaine, did you?

A No, I didn't.

Q They had to search you to find it; isn't that right?

A Yes.

Q And after they searched you and found it, that is when you started to tell them about Johnny; right?

A No.

Q When did you start to tell them about Johnny?

A Oh, I imagine it was about three or four hours later.

Q Three or four hours later?

A Yes.

Q You had thought it over a little bit; right?

A Yes.

Q Did the officers tell you about this circumstance that—withdraw it.

What did the officers say to you that caused you to tell them about Johnny?

A I don't remember now. I can't recall the conversation with the officers just at that time.

Q You don't remember?

A No, I don't.

Q Tell us what they said, the substance of what they said to you.

A (No response.)

[fol. 36] Q Well, let's put it—

A Well, they asked me was I alone and—did I come by myself and—

Q What did you tell them?

A First I told them yes, I came by myself, at first.

Q At first you told them a lie; right?

A Yes.

Q All right.

Then when did you change your story?

A Why did I?

Q When did you? How long after that?
A Oh, about ten, twenty minutes. Wasn't too long.
Q Twenty minutes later you told them you came with Johnny?
A Yes.
Q What else did you tell them about Johnny?
A I can't remember.
Q Well, did they ask you anything more about him?
A They asked me quite a few questions.
Q They asked you where he lived?
A Yes, I'm quite sure they did.
Q Well, you volunteered the information that Johnny asked you to come down there and bring this package back; is that right?
A Yes, I did.
[fol. 37] Q And did they tell you anything that caused you to do that?
A No, they didn't.
Q You just voluntarily stated to them, "Look, fellows, I want to tell you; I came down here to get this package for Johnny and bring it back"; right?
A No—well, they told me that they knowed I wasn't by myself, so I might as well tell the truth.
Q You weren't there by yourself so you might as well tell the truth?
A Yeah.
Something of that sort.
Q Did anybody say anything to you about whether you would be prosecuted in this case if you implicated Johnny?
A Rephrase that. I don't understand.
Q Did anybody tell you you would not be tried for carrying the package across the border if you implicated Johnny?
A No.
Q Nobody told you that?
A No.
Q Are you being prosecuted?
A I'm quite sure.
Q You are?
A Yes.

[fol. 38] Q Now, the officers placed some type of radio device on your body before you went to Johnny's apartment; is that right?

A Yes, they did.

Q And they told you they were going to listen to the conversation?

A Yes.

Q And did they tell you what to say to Johnny when you got to the apartment?

A No, all they did was hook me up.

Q Hook you up.

But you knew what you were going to say, didn't you?

A No, I didn't.

Q Well, you knew why you were going to the apartment?

A Yes, but I didn't know what I was going to say.

Q Well, you knew you had this package with you that you were going to give to Johnny?

A Yeah.

Q And you knew that the officers were following you and going to listen to the conversation;—

A Yes.

Q —you knew that, didn't you?

A Yes.

Q And you wanted to help out, didn't you?

A Yes.

[fol. 39] Q And you tried your best to help out, didn't you?

A Yes.

Q And you put the package under the pillow, didn't you, on the sofa?

A No.

Q You didn't?

A No.

Q When you gave Johnny the package, you didn't ask him for the hundred dollars then, did you?

A No, I didn't.

Q Did you still have your $50 with you?

A Yes, I had my money with me.

Q You hadn't spent any of it?

A Maybe a dollar or fifty cents or something. I don't know.

Q Did the officers take your money away from you?

A At one time they took my money and—when they first arrested me, they took everything I have.

Q And then when you told them that you would lead them to Johnny with the package, they gave you your money back?

A Yeah.

Well, in the, at first they wasn't going to give it back, but I said, "I think I'm—should have my money, my stuff on me if I'm going to go up there with the package."

Q And when you arrived at this apartment, a girl [fol. 40] answered the door; you didn't give Johnny the package then, did you?

A Not in front of the lady, no.

Q No, you asked to be alone, didn't you?

A Yes.

Q And when the girl left the front room, then you gave the package; right?

A Yes.

Q In this telephone call, did Johnny tell you he had been stopped at the border?

A I think so. He said something of that sort.

Q Of that sort?

Didn't he tell you he was arrested in Mexico?

A He said something like that, yes.

Q Something like that?

A Yes.

Q When the officers came in the apartment, did they do anything with you?

A Yes, they did.

Q What did they do?

A Took me outside.

Q And you had a conversation with them, didn't you?

A I, I I was too nervous to say anything.

Q Too nervous?

A Yes, I was nervous.

[fol. 41] Q What were you nervous about?

A Well, I didn't ever did nothing like that before.

Q You mean you have never taken the officers to somebody that you have told them was pushing, dealing in narcotics; you have never done that before?
A No. No.
Q Or it made you nervous this time?
A Yes, it made me awful nervous.
Q You were working with the officers, weren't you?
A That ain't nothing. I was still scared.
Q I am sorry; I can't understand you.
A I was still scared.
Q You were still scared?
A Yeah.
Q Scared of what?
A I don't know.
Q They had already told you you wouldn't be prosecuted, hadn't they?
A No, they haven't told me that yet.
Q They haven't?
A No.
Q Have you ever been convicted of a felony?
A No, I haven't.
Q Never?
A Never.

[fol. 42] MR. BRADLEY: I have nothing further, your Honor.

MR. GOTT: Nothing further from this witness at this time, your Honor.

THE COURT: All right. You may step down.

(The witness left the stand.)

MR. GOTT: Call Mr. Hopkins, customs agent.

DAVID W. HOPKINS,

called as a witness by and on behalf of the government, after having been first sworn, was examined and testified as follows:

THE CLERK: Please be seated.
Will you state your name, please.
THE WITNESS: My name is David W. Hopkins.

DIRECT EXAMINATION

BY MR. GOTT:

Q Mr. Hopkins, who do you work for?
A I work for the United States Customs Agency Service in Los Angeles.
Q In what capacity?
A I'm a Customs Agent.
Q Have you ever had anything to do with the case, the Johnny Sabbath matter?
A Yes, I did.
[fol. 43] Q And when did you first have something to do with that matter?
A On the night of February 19th, 1966.
Q When did you first meet Mr. Sabbath?
A On approximately 7:30 p.m. on February 20th, 1966.
Q And where did you meet him?
A At his apartment.
Q And do you know now where that is?
A Yes, I do.
Q And where is it?
A It's 1115 West 90th Street, Apartment No. 6.
MR. BRADLEY: Pardon me one second.
THE WITNESS: As best I can remember.

* * * *

[fol. 44] Q Then, Mr. Hopkins, you first saw the defendant then at his apartment on 90th Street in Los Angeles on a Sunday?
A Yes, sir.
Q On the 20th of February?
A Yes, sir.
Q Did you or did you not participate in placing a radio transmitter device on the witness who just testified?
A I did, sir.
Q And where did this take place?
A I don't remember the exact location, but it was in a parking lot somewhere near 90th Street. I don't recall the exact location.
Q Now, what happened directly after that, if anything?

[fol. 45] A Well, after placing the electronic device on Mr. Jones, Mr. Jones and another fellow, another CPI by the name of Mr. Honore proceeded to Mr. Sabbath's residence. And the other units that were present that night proceeded to go to that same locale.

Q And were you in one of the other units then?

A Yes, I was. CPI Gore was with me.

Q CPI Gore is the gentleman seated at counsel table (indicating)?

A Yes, sir.

Q What is a CPI?

A That's a Customs Port Investigator.

Q And Mr. Honore is a Customs Port Investigator, too?

A That is right.

Q Now, did you monitor a conversation on the radio?

A Yes, sir.

Q And do you know now what that conversation was?

A Parts. I—I'd like to explain something here.

The electronics device was working. However, there was a stereo in the apartment, and it was turned on quite loud, and I was able to only hear parts of the conversation.

Q Will you tell us the parts that you heard.

A Yes.

Well, as I heard the knock on the door, and I heard a woman answer the door—

[fol. 46] Q Now, could you see—

A No.

Q —Mr. Jones knock on the door at that time?

A I could not see this. From my location, no.

Q Proceed then with what else happened.

A Then there was just a general greeting; I don't recall the exact words. Anyway, a lady answered the door, and I recognized Mr. Jones' voice asking if Johnny was in.

She says, "Yes; just a minute."

And I heard steps. The next thing I heard was Mr. Sabbath—or another voice; I did not know if it was Mr. Sabbath at the time—it was a male voice—talking to Mr. Jones.

This male voice stated, "Did you have any"—something to the effect, "Did you have any problems getting through the line?"

And Mr. Jones replied, "No, hunh-unh, no problems."

Then the music—it was kind of a—the music would get loud, and then it would slack off, and loud again, and this faded off for a few seconds, and there was general conversation—about the trip, how he got, how Jones got to Los Angeles; this type conversation.

And then I heard footsteps, and they walked over—it appeared to go towards the window. We had another agent that reported their progress in the room.

Q And did you hear anything further on the elec-
[fol. 47] tronic box?

A Well, I, I heard a part of a conversation; something about—package. I heard the word "package" mentioned, and I heard a reply.

This, this is about all I could gather from that, but I definitely heard the word "package" from one voice, and the other voice replied something, but the music again was fairly loud and I could not exacly make it out.

Q Now, how long after you heard the knock on the door was it that you saw Mr. Sabbath?

A I would say approximately five minutes.

Q And tell us exactly what happened just prior to seeing Mr. Sabbath, if anything.

A Yes, sir.

Since we were not getting real good reception on the electronic device due to the loud music, we decided it was time to go into the apartment.

So Agent Dennis, CPI Gore and Customs Port Investigator Carter and I proceeded to the apartment door.

I knocked on the door, waited a few seconds, and no answer came from within, so I opened the unlocked door and came into the apartment.

As I entered the apartment, Mr. Jones was setting in a chair next—which was located on the, on a wall—if I may explain this—

[fol. 48] MR. GOTT: Yes.

May the witness draw this on the chart here for the jury, your Honor?

THE COURT: All right.
MR. GOTT: The location of the furniture.

(The witness stepped down from the stand.)

THE COURT: Do you have a grease pencil?
THE WITNESS: Yes, sir (diagraming).
THE COURT: Make the drawing and then the explanation after you have finished it.
THE WITNESS: This—
THE COURT: No, not "this." Mark it.
THE WITNESS: Here's the front door right here (indicating)—
THE COURT: Mark that with an "F".
THE WITNESS: An "F"? Okay (indicating).
There's a closet over here (indicating).
THE COURT: Mark that with a "C".
THE WITNESS: "C" (indicating).
This is the living room here (indicating). It's a fairly large living room. There is a—this is a little bit out of scale, but there is also a breakfast bar, something like this here (indicating).
This is the kitchen; the couch is located against this wall; there is a window—
[fol. 49] THE COURT: Against the left-hand wall.
THE WITNESS: Against the left-hand wall.
This is the couch (indicating).
There's a window here and a chair was setting here (indicating).
As I came in the door, I came in this way, was standing here (indicating).
I think this is all I need to draw right now.
THE COURT: All right.

(The witness resumed the stand.)

BY MR. GOTT:

Q Now, will you—you might remain down there a moment—

(The witness stepped down from the stand.)

BY MR. GOTT:

Q Tell us where Mr. Sabbath was and where Mr. Jones was when you first saw them.

A Mr. Jones was sitting on, in this chair right here (indicating).

Q Make a "J" there then for "Jones."

A (Indicating).

Q And where was Mr. Sabbath?

A Mr. Sabbath was sitting on this end of the couch (indicating)—

THE COURT: On the north end of the couch.

[fol. 50] THE WITNESS: On the north end of the couch.

I believe that the couch had two large cushions and he was sitting approximately in this position here (indicating).

BY MR. GOTT:

Q Put an "S" there then, would you please.

A (Indicating).

Q For "Sabbath."

Now, you can resume the witness stand if you don't mind.

A (Resuming the stand) There's also a coffee table in front of the couch and some other furniture in there, but I—and also I might explain, too, the stereo—I should place the location of the stereo.

Q Yes. Where was the stereo?

A (Stepping down from the witness stand) This is the reason why that the music was so—the stereo was located right on this wall right here (Indicating).

Q Was it playing when you came in there?

A Yes, sir, it was (resuming the stand).

Q Now, tell us exactly what you observed if anything concerning the two persons you saw there.

A Yes, sir.

I was the first one into the apartment. When I entered the apartment, I immediately was going to arrest [fol. 51] the occupants of the apartment. As I came around the corner from the door, I saw Mr. Sabbath

sitting on the couch, and his hand was placed between the cushions and his—he made a—his hand was kind of cupped like this (indicating), and he appeared to be moving his hand towards, underneath his body, below the cushion.

And then just a fraction of a second later, he pulled his hand out and placed it on his lap.

And then I told them that they were under arrest. I went to the couch, removed Mr. Sabbath from the couch, placed him against the wall, did the same with Mr. Jones, conducted a very brief search of their persons for weapons, and then backed off.

I saw Customs Port Investigator Honore immediately proceed to the couch and remove the north cushion—or I believe it would be north—anyway, where Mr. Sabbath was sitting on, that same cushion. He picked it up, and there was a rubber contraceptive laying on that cushion.

MR. GOTT: May the witness be shown Exhibit 1.

(Clerk complied.)

(Discussion off the record between Mr. Gott and Mr. Gore out of the hearing of the jury.)

BY MR. GOTT:

Q Did the package you saw resemble in any way Exhibit 1?

[fol. 52] A Yes, it did.

* * * *

[fol. 54] MR. GOTT: Your Honor, at this time I would offer a verbal stipulation from counsel and the defendant that Mr. Johnny Sabbath was in Mexico on Friday the 18th, Friday night, the night of Friday the 18th of February, 1966.

MR. BRADLEY: We will so stipulate, your Honor.

THE COURT: Is that agreeable, Mr. Sabbath?

DEFENDANT SABBATH: Yes, your Honor.

THE COURT: All right.

MR. GOTT: Nothing further from this witness, your Honor, at this time.

CROSS EXAMINATION

BY MR. BRADLEY:

Q Agent Hopkins, you talked with Mr. Jones at sometime prior to this arrest, did you not?

[fol. 55] A Very briefly.

Q Well, when was it that you talked to him?

A In the parking lot on the—on February 20th.

Q You had information from some of your fellow officers in regard to what Jones had told them?

A Yes, sir.

Q At the time you placed this radio device on his body, did you give him any instructions?

A I don't recall giving him any specific instructions.

Q Had Jones told you that Mr. Sabbath was going to give him a hundred dollars?

A No, he had not told me this.

Q But your fellow officers had told you that?

A Yes.

Q Did you make a search of Mr. Jones' person before you put the device on his body?

A Yes, sir.

Q Did you find any money on him?

A Not at the time that I conducted the search.

Q Did you find any money on him at the time you arrested him?

A Yes, I did.

Q What did you find?

A Fifty-some dollars.

Q He didn't have a hundred dollars?

[fol. 56] A No, he didn't have a hundred dollars.

Q And you conducted a search of the apartment?

A Yes, sir.

Q By the way, how was Mr. Sabbath dressed when you broke into the apartment?

A When we entered the apartment, Mr. Sabbath and a—had an undershirt on and some bright red boxer shorts.

Q That is all; he didn't have pants on?

A No, he did not.

Q When did you first meet Mr. Jones?

A I saw Mr. Jones—on February 19th, briefly.
Q Was that the first time?
A Yes, sir.
Q You didn't know him before that?
A No, sir.
Q Did you have a warrant for the arrest of anybody?
A In this case?
Q Yes.
A No.
Q Did any of your fellow officers have a warrant?
A No, sir. Not to my knowledge.
Q You tested this recording device of yours befort you let Mr. *Sabbath* go to the apartment?
A Before Mr. Jones went to the apartment?
Q Mr. Jones went to Sabbath's apartment. Pardon me.
[fol. 57] A Yes, sir, we did.
Q And it was working satisfactorily?
A Yes, sir, it was.
Q And you were prepared to make a recording?
A Yes, sir, we were.
Q But because of the hi-fi playing or some electrical instrument in the apartment, you didn't make any recording; is that right?
A I think a, a recording was—was attempted.
Q Was attempted.
When you first broke into the apartment, what was the first thing you did?
A Upon entering the apartment, I had my gun drawn. I stood—just as I entered the living room, I was—I stood there and advised the occupants that they were under arrest.

* * * *

[fol. 58] Q Were you the chief officer of this investigation, supervising it?
A At this particular portion of it, I was in charge.
Q And you had no warrant?
[fol. 59] A I did not.
Q You made up your mind you were going to arrest the occupant of this apartment?

A After hearing the conversation that I overhead on the electronic device, this, coupled with other information that I had access to.

Q Well, the other information you received from Jones; isn't that right?

A I received this information from other agents who had questioned Mr. Jones.

Q The other agents, customs agents; right?

A Yes, sir.

Q And they told you what Jones told them; is that right?

A That's correct.

MR. BRADLEY: I have nothing further, your Honor.

REDIRECT EXAMINATION

BY MR. GOTT:

* * * * *

[fol. 60] Q Did you find anything else in the apartment?

A I observed another agent find some items.

Q What?

A Besides Mr.—Mr. Honore found the—

MR. BRADLEY: I am going to object to this as improper rebuttal.

MR. GOTT: I will reopen on direct then, your Honor. I did overlook it.

THE COURT: All right. Go ahead.

THE WITNESS: Customs Port Investigator Al Honore found the small, a small package, rubber contraceptive under the cushion on the couch in the living room. He also found several small aluminum square tins, just pieces of, like tinfoil cut in squares in the kitchen, in a small drawer. And he found a quantity of small rubber balloons in the bedroom.

BY MR. GOTT:

Q Did you see any children in the house?

A I did not, sir.

Q Did you see any children's clothes in the closet?

A No, sir.
Q Did you find any money?
A Yes, sir, I did.
Q How much?
A It was approximately $500.

[fol. 61] MR. GOTT: Nothing further, your Honor.

Strike that.

Q Did you see a 1965 blue Cadillac convertible in the vicinity?
A Yes, I did.
Q And where was that?
A This was located in the carport outside of the apartment.

MR. GOTT: Nothing further.

MR. BRADLEY: I have no further questions, your Honor.

May we approach the Bench again?

THE COURT: Yes.

You may step down.

(The witness left the stand.)

(The following proceedings were had at the Bench between Court and counsel with defendant present out of the hearing of the jury.)

MR. BRADLEY: Now, your Honor, in view of this officer's testimony, in view of this agent's testimony that he went to this apartment without a warrant, with the intention of arresting the occupants, and the only information that he is relying upon was the information given to him by Jones, and he, Jones, he had never seen before in his life, there is no evidence to establish whatsoever that Jones is a reliable informant, sufficient to justify [fol. 62] this officer's breaking into somebody's apartment without a warrant—

THE COURT: No, but what he heard over the radio transmitter confirmed what was told him.

MR. BRADLEY: Well, that is pure speculation that it confirms anything because all he testified to—

THE COURT: Well, I know, but isn't that sufficient?

MR. BRADLEY: Not pure speculation; he must have reasonable cause.

THE COURT: Well, I know, but from what Jones had told him, plus the fact that he heard this voice—

MR. BRADLEY: He only identified it as a voice, your Honor; he didn't say it was Sabbath.

THE COURT: I know, but—

MR. BRADLEY: Jones was doing his own talking for his own benefit to sustain his own story.

THE COURT: Yes, I know that, but he heard this voice say, "Did you have any problems getting through the line?"

MR. BRADLEY: That does not—

THE COURT: I know, but a voice said that. Then another individual added—then he heard something about a package.

MR. BRADLEY: But he didn't know whose voice it was.

THE COURT: But, as I say, I am going to deny the motion.

MR. BRADLEY: All right.

THE COURT: All right.

(The following proceedings were had before the jury.)

[fol. 63] MR. GOTT: Move that Exhibit 1 be admitted into evidence.

MR. BRADLEY: No objection.

THE COURT: May the chart be marked Exhibit 2?

MR. GOTT: Yes, and Exhibit 2, the chart.

MR. BRADLEY: No objection.

THE COURT: May be received.

(Government's Exhibit No. 1 for identification received in evidence.)

(Chart marked Government's Exhibit No. 2 for identification and received in evidence.)

* * * *

[fol. 64] JOHNNY L. SABBATH,

the defendant herein, called as a witness on his own behalf, having been first sworn was examined and testified as follows:

THE CLERK: Please be seated.
Would you state your name, please.
THE WITNESS: Johnny L. Sabbath.

DIRECT EXAMINATION

BY MR. BRADLEY:

Q Mr. Sabbath, where do you reside?
A I reside at 11808 New Hampshire.
Q Is that a residence or apartment?
A Apartment.
Q What apartment do you reside in?
A Fifteen.
Q And were you residing there on February the 20th?
A No.
Q Were you residing there on February the 19th?
A No.
Q Well, when did you start—Is this after the arrest, the different location?
A Yes, sir.
Q Where were you residing at the time you were arrested?
A 1115 West 90th, Apartment 6.

* * * *

[fol. 67] Q Now, did you ever meet the witness Jones that testified here?
A Yes, I have.
Q And when did you meet him?
A I met Mr. Jones—in 1966.
Q About what time?
A This was latter part of January.
Q And where did you meet him?
A I met him at an—a fellow that live upstairs from me; Mr. Ray Jones. Apartment.
[fol. 68] Q That is in the same building?
A Yes, sir.
Q And to your knowledge is Ray Jones related to this man Jones?
A As far as I know they are cousins.

Q And it was at Ray Jones' apartment that you met this Mr. Jones?

A Yes, sir.

Q Thereafter did this Jones that testified here ever visit you at your apartment?

A Approximately three times, including the time that he was there.

Q At the time you were arrested?

A Yes.

Q Three times prior to that—

A No, three times including that. Just say twice prior to that.

Q Did he have any particular purpose in coming to your apartment?

A Well, he would, when he would, when he'd come to my apartment, he'd be looking for his counsin that lived upstairs. Whenever he wouldn't be at home, he'd come down to my place.

Q Does Ray Jones still live in that building?

A No, he doesn't.

Q He moved out? Approximately how long ago?

[fol. 69] A Approximately a month ago.

Q Now, did you make a trip to Mexico in the company of Jones?

A Yes, I did.

Q And you were in your automobile?

A Yes, sir.

Q And tell us when was that?

A This was Friday, February the 18th.

Q What time did you leave Los Angeles?

A I left Los Angeles approximately four—between four and four-thirty; something like that.

Q Have you ever been to Mexico on any other occasion?

A This was sometime ago when I lived in Louisiana; I came out here once on a visit.

Q How long ago was that?

A This was before nineteen—I came out in 1956. This was before 1956.

Q Since that visit to Mexico, had you ever been to Mexico at any time up to the date of February 18th, 1966?

A No, sir, I had not.

Q Do you know anybody in Mexico?

A No, I do not.

Q Now, did you have any discussion with Jones in regard to the purpose of your trip to Mexico before leaving Los Angeles?

[fol. 70] A Yes, I did.

Q What was that?

A Mr. Jones called me and asked me if I would pick him up because he didn't have his car.

Q Where was he?

A Mr. Jones was on 37th Street in Los Angeles.

Q Do you know what he was doing there?

A His father is supposed to live there.

Q All right.

Did you go and get him?

A Yes, I did.

Q And then what happened?

A I picked him up and—I thought he wanted me to take him out to his home, out on hundred and thirty-fifth street, but he said, well, he wanted me to take him some other place, to talk to some people or something.

Anyway, I carried him about three different places, but I didn't go in. I don't even know who he talked with.

And in the meantime, he was telling me that he have good tips on horses and dogs and things of that sort. This is what he said is his business.

And he suggested for me to come—first he asked me what was I going to do. I said, "Nothing."

So as time passed on, we conversed, and he suggested that we go to Mexico because they play dogs down here [fol. 71] at night. And that he played them frequently. And he had inside information on the dogs.

So after going on, I agreed, "Yes, let's go."

Q So you agreed to drive him to the dog races?

A Yes, sir.

Q And you did that?

A Yes, I did.

Q What happened when you arrived in Mexico?

A Well, when I arrived in Mexico, he suggested for me to park in front of the motel there. In front of the —it's a motel in front of the dog races. He suggested for me to park in the parking lot there.

Q And you did?

A Yes, I did.

Q And then what happened?

A Then we—after we—we proceeded to the race track. And I—we was approximately halfway to the place, and he asked me, say, "Do you want narcotics?" And I said, "Nar—no."

Q All right. Then what happened?

A And then I said—well, I—See, at this point I figured that he had forgotten about this particular business, this narcotics business, so I went back to my car, and I locked it because I had a camera and a coat in it, so I asked him to get me two tickets—I mean, to get me [fol. 72] a ticket, one for himself and one for me.

Well, I returned to the gate, and there was no one there, and I asked some of the people that was there, had they seen a fellow—I described his, his height and his complexion and what have you, and they said no.

So I'm here, down here; I don't know anything about playing the dogs, so then I walked back down to this, this liquor store that's in front of the race track, and at this point this Spanish fellow came up to me and asked me did I have a match. I told him no.

Q Now, just a minute.

Approximately what time did you arrive at the dog race track?

A This was approximately—I guess about seven o'clock; something like that.

Q And approximately then what time did this Spanish fellow come up to you?

A Oh, this was sometime after that.

Q About how long?

A Oh, say maybe—maybe forty-five minutes; something like that.

Q All right.

Continue. What happened when this Spanish fellow came up?

A Well, this fellow asked me for, asked me did I have [fol. 73] a match and at that particular time I didn't smoke, so I told him no, I didn't have a match.

As a matter of fact, I felt in my pocket to see if I had one, and I proceeded to my car. And this person was walking up to me and—

Q This is not the Spanish fellow?

A No, this is another Spanish fellow.

Q Oh.

A He was walking up to me, and I said, "This guy, he's up to something," so I grabbed a brick. I was going to hit him because he looked like he was going to jump on me, so this guy pulled out his pistol, and he said, "Policia, policia, policia," three times, and I started yelling, "Help, robbery; help, robbery."

So I disturbed such a commotion there until the people from the motel came out—and they grabbed me and said that—"Did you come down to make a buy?"

I said, "No, I did not."

I said, "Buy what?"

And then he went on to talk, said that I had—where was this other guy that, you know, that was with me.

So in turn they carried me down to the station. I was still under—I wasn't sure if these were the police or not, so they carried me down to the police station, and they questioned me, asked me my name; I told them. They [fol. 74] asked me have I ever used any narcotics.

I said, "No," and the—if—investigated my arm and all that, so they called in to see if I had violated some kind of law or what have you.

But, anyway, they called, supposedly, the F.B.I., and they gave—said that, you know, I didn't have no—something. So they had my personals, they had my money, they had my car keys, and what have you.

In a brown envelope.

Q All this is on Friday—

A This is on Friday—February the 18th.

Q Okay. Go ahead.

A And this officer, after questioning me, knocked me around.

He said, "Well, I'm going to give you the personals back. Will you sign this stating that you have received your property?"

I did. So this guy gave me the envelope, but it just so happened there was no money in it. And I had—oh, approximately four or five hundred dollars; something like that.

So I said, "Well, where's my money?"

He said, "Well, you can go."

I say, "I can't go any place with no money." I say, "I have a wife and a son to support."

[fol. 75] So this guy says, "Oh, we better put you back in jail," so he put me back in this place.

So, then, acted like he was going to turn around, acted like he was going to shoot me, so he said, "Well, you mean you don't want to go?"

I said, "Well, I have not committed a crime. I came down here to the dog races." I said, "People want to take my money," I say; "You can't do that."

So he says, "Well, all you got to do is come back tomorrow and they will give you your money back."

I says, "No, wherever my money go, I will have to go."

So this—also—this officer pretended that he was going to take me to the jail house to book me.

Now, this was in—The place that I'm talking about now was where they questioned me. They had no facilities there to keep me in jail. So they carried me to this place where they lock you up.

So I got out of the car, and they started up—and they say, "No, come on; get back in the car."

So I got back in the car. And they drove me around. Said, "Well, you know, what—why—don't you want to get out of this?"

And I say, "Well, I haven't done anything."

So finally he decided that he would give me my money [fol. 76] back. But he gave me half of it.

I said, "This is not all of my money."

He says, "Well, I'm letting you off light."

I said, "Light?" I said, "I haven't done anything."

Then he proceeded—then he said, "Well, okay," says, "I'm going to give your money back. Don't ever let me catch you back in Mexico again."

He gave me my money back, gave me my car. I proceeded to Los Angeles. This is now—I arrived in Los Angeles—about—say maybe four, four o'clock Saturday morning.

Q Where did you go when you arrived in Los Angeles?

A I went to my apartment.

Q Did you meet anybody else in Mexico other than the first Spanish fellow that asked you for a match and the police officers, the Mexican police officers?

A No, I did not.

Q Did you go any place else other than what you have described?

A No, I did not.

Q Do you know anybody else in Mexico?

A No, sir, I do not.

Q At any time did you give the witness that testified here a package that contained cocaine?

A No, sir.

Q In Mexico or anywhere else?

[fol. 77] A No place.

Q Did you ever have any conversation with him in which you promised to give him a hundred dollars to bring some cocaine back from Mexico?

A No, sir.

Q Did you ever give him any money?

A No, sir.

Q In Mexico or in Los Angeles or anywhere else?

A No place.

Q You were arrested then on February the 20th; is that right?

A In Los Angeles, yes.

Q About what time was that?

A This was approximately—nine something.

Q And what happened at the time you were arrested? How did that take place?

A Well, there was a knock at my door. I was asleep at the time. This girl, she was down from San Francisco

to visit with me. And this knock came, was a knock on the door, and this girl got out of bed and went to the door.

And she asked who it was. She asked me, she say, "It's the fellow says his name is"—let's see—B.J. I think. And—

Q Did you recognize who B.J. was?

A Yes, he say his name is B.J.; that stands for Bill [fol. 78] Jones.

Q All right.

A And she let him in the apartment.

* * * *

[fol. 85] Q What date were you arrested in Los Angeles?

A That was February 20th.

Q What time of day was that arrest?

A This was about 9:15; yes, about 9:15 Sunday night.

Q And that was at your apartment?

A Yes, it was.

Q. Tell us what happened before the arrest.

A Before the arrest there was a knock at my door and the lady that was there visiting from San Francisco, she answered the door and she asked, "Who is it?" and Mr. Jones said, "B.J." and she told me what you know, [fol. 86] what he said, and I said, "Well, let him in."

Q Then did Jones come in?

A Yes, he did.

Q And what did Jones do?

A Mr. Jones said he would like to speak with me, so I asked him—

Q Just a minute. When Jones came, did she let him in the apartment?

A Yes, she did.

Q Where were you at that time?

A I was in bed.

Q And what happened next?

A She let Mr. Jones in and he said he would like to speak with me and I told him he could come back in the bedroom. He said, "No, I want to speak to you up here."

I was under the impression—

Q Pardon me. What do you mean by "up here."

A Up in the living room.

Q Oh, all right.

A And I told him, "Well, no, you can come on back; she have her clothes on," and he said, "No, I want to speak to you up here, so I said, "Okay."

Q Again, you mean the living room.

A Yes, in the living room.

Q So then what happened?

[fol. 87] A I went up and I was—

Q What do you mean by "up"?

A I went to the living room.

Q All right.

A And I was telling him about the incident that I had in Mexico.

Q What do you mean by "incident"?

A About them picking me up and what they did to me and what-have-you.

Q Now, prior to Mr. Jones coming to your apartment, did you have a telephone conversation with Mr. Jones?

A Yes, I did.

Q When did that occur approximately?

A I would say about 4:00 or 5:00 o'clock, something like that.

Q And what was the subject of that conversation?

A Well, he say who he was. I was excited and telling him about what happened to me. This was the main thing.

Q You mean, what happened to you?

A In Mexico.

Q In Mexico; that is, your arrest and so forth.

A Yes, sir.

Q And in that conversation, did you make a statement to Jones, "Did you have any trouble coming across the line?" or something to that effect?

[fol. 88] A Well, I'm not sure if I did or not, but it's possible I did because I wanted to know what happened to him, and they gave me such a bad time down there.

Q I see. In that conversation, did you mention the word, "package"?

A No, I did not.

Q Do you know if Mr. Jones mentioned the word "package"?

A No, I do not.

Q You don't know whether he did or not?

A No, I don't.

Q In that conversation that you had with Jones, were there any remarks about the hundred dollars that you were supposed to pay?

A No.

Q The rest of the conversation—what was that about?

A Just about my incident in Mexico.

Q Did Jones tell you in that conversation that he was coming to your apartment?

A This I can't remember, if he did or not.

Q Do you know what day the conversation was, the telephone conversation?

A This was on a Saturday.

I would like to retract that. It was on a Sunday.

Q This was the same day as your arrest?

A Yes.

[fol. 89] Q And about how long before the arrest was this conversation?

A How long?

Q How long before the arrest, prior to the arrest?

A About four hours.

Q When Jones arrived at the apartment, how long after he arrived did the agents enter the apartment?

A I would say from five to eight, ten minutes.

Q And during that time that Jones was in the apartment before the agents entered, did he mention anything about the hundred dollars that you were supposed to pay him?

A No, he did not.

Q Did you say anything about a hundred dollars you had for him?

A No, I did not.

Q Did you have the money in the apartment at that time?

A Yes, sir.

Q How much money?
A Approximately four or five hundred dollars.
Q That was the same money you had with you when you went to Mexico?
A Yes, sir.
Q Now, this girl that was in the apartment with you at that time—was she in the living room with you also?
A No, sir.
[fol. 90] Q Did something happen that caused her to leave the living room?
A Yes. Well, when Mr. Jones came into the apartment, well, from what he said, for me to come up to the living room, well, she just, you know, stayed back in the bedroom.
Q Did Jones ask her to go back in the bedroom?
A No, she went voluntarily.
Q When the agents entered the apartment, did anything happen to Jones?
A Yes. When they came in, they took Mr. Jones out of sight immediately, and—
Q Did they put handcuffs on him?
A No, they did not.
Q Then what happened?
A They took him out and they stayed out for a little while and then they brought him back in.
Q And then they went and got this package.
A Yes, sir.
Q Did they have to search around the apartment any to find it?
A I believe they looked in my kitchen and the trash can, and what-have-you, drawers and what-have-you.
Q At any time did you have any agreement with Jones to have him bring back some cocaine from Mexico?
A No, sir.
[fol. 91] Q Did you give him any money for the purpose of purchasing cocaine in Mexico?
A No, sir.
Q At the time that Jones was in the apartment prior to the arrest, did he appear to you to be excited?
A No, sir.

Q Did Jones at any time deliver any package to you prior to the arrest?

A No, sir.

MR. BRADLEY: I have no further questions.

THE COURT: Let me ask a couple of questions.

BY THE COURT:

Q As the officers came into the apartment, what did they do immediately or thereafter?

A I have to start from the beginning. The officers came into the apartment with their guns drawn and I thought somebody was going to shoot me, and they grabbed Mr. Jones and rushed him outside, and hung me back in a corner and just, things happened so fast, I just—

Q When in relation to the time that they came in did they find the package under the cushion?

A I would say this was maybe five minutes, maybe.

Q Did they find it under the cushion before Jones came back or after he came back?

A They found it after they brought Mr. Jones back.

[fol. 92] THE COURT: All right; go ahead.

CROSS EXAMINATION

BY MR. GOTT:

* * * *

[fol. 97] Q What is your phone number there at that location where you were arrested?

A 755-1800.

Q Whose number is 758-9794?

A I don't know. It could possibly have been a number that I had prior to the 755-1800.

Q Well, you do recall specifically talking to Mr. Jones [fol. 98] approximately four hours prior to your arrest on the telephone.

A Yes, sir.

Q And he told you at that time that he was in San Diego, did he not?

A No, sir; I didn't hear him say that.

* * * *

[fol. 107] GEORGE R. GORE,

called as a witness by the plaintiff, was duly sworn by the Court, and testified as follows in rebuttal:

THE COURT: Your full name, please?
THE WITNESS: George R. Gore, G-o-r-e.

DIRECT EXAMINATION

BY MR. GOTT:

Q Who do you work for, Mr. Gore?
A United States Customs Agency Service.
Q In what capacity?
A Supervising Customs Port Investigator.
Q Were you so employed on or about February 19-20, 1966?
A Yes, sir, I was.
Q Did you participate in a phone call, a phone call to this defendant or or about those dates?
A Yes, sir, I did.
Q Will you tell us about when the phone call occurred and exactly what happened?
A The first phone call was placed approximately 2:45 a.m. on February 20, 1966 in Los Angeles.
Q And where was that placed from?
A It was placed from the Jaycee garages on Winslow in Los Angeles.
[fol. 108] Q What were you doing at the Jaycee Garage on Winslow?
A I had taken Mr. Jones, along with Customs Port Investigator White, to Los Angeles and met with the Los Angeles agents.
Q Was this garage someplace where Customs cars are kept, or—
A Yes, correct.
Q Do you know now what number you dialed?
A Yes, sir, I do.
Q Did you dial it or did someone else dial it?
A Mr. Jones dialed it.
Q Did he dial it in your presence?

A Yes, in my presence and also the presence of another agent.

Q And what is that number, if you know?

A 758-9794.

Q Is this the same number that was dialed on a later occasion?

A Yes, sir.

Q And on some later occasion did the defendant answer the phone?

A Yes, sir, that was at approximately 3:00 p.m. on February 20, 1966.

Q Where did you get this number?

A This number was on a small card that was in the presence of Mr. Jones when he was arrested at the port [fol.109] of entry, San Diego.

Q It was on Mr. Jones' person?

A That's right.

Q Did it have a name on it?

A Just Johnny, sir.

Q Now, tell us what happened when you first dialed this number at 2:00 o'clock in the morning on the 20th?

A There was no answer, sir.

Q How many times after that was the number called in your presence and over what period of time?

A Only one other time in my presence. However, there had been three other phone calls between the one at 2:00 o'clock and the one at approximately 5:00 a.m. in the morning.

Q And was there any answer?

A No, sir.

Q Now, when did you next attempt to call, if you did?

A That wasn't until the following afternoon at approximately 3:00 p.m., the afternoon of the same day.

Q Where was that call placed from?

A From the Narcotics Division of the San Diego Sheriff's Office.

Q And what number was called then, if you know?

A 758-9794.

Q In Los Angeles?

A Yes, sir.

[fol. 110] Q And who dialed that number?

A I dialed it myself, sir.

Q And did someone answer?

A Yes, sir.

Q And what was said? Strike that.

Who all was present on your end of the conversation when the conversation took place?

A There was myself, Mr. Jones, and a Sheriff's Narcotics officer who was assisting us in using his recorder and his tape.

Q What was said on that conversation?

A Mr. Jones related to the party on the other end that he was still in San Diego and that he still had his thing, and the party on the other end asked if he had any trouble getting through the line. Mr. Jones said, "No." He said, "Well, I had a little bit of trouble down there, but I'll tell you about that when I see you."

Q Who said this?

A This was the party on the other end of the line.

Q Was it a male or female?

A Male.

Q Did Mr. Jones mention any name to the party on the other end when he first answered?

A Yes, he called him Johnny and told him this was B.J.

Q And tell me again, now, as nearly as you can recall about what time this conversation took place.

[fol. 111] A It was approximately 3:00 p.m.

Q And how long was it later that you arrived at the apartment in Los Angeles?

A Approximately 8:15 p.m.

Q Was anything further said in this conversation?

A Yes, sir. Mr. Jones asked the party on the other end if he was going to be home and he said, "Yes," and he said, "All right; I'm on my way up. I'll see you in a little while."

MR. GOTT: Nothing further.

* * * *

[fol. 112] DONALD R. CARTER,

called as a witness by the plaintiff, was duly sworn by the Court, and testified in rebuttal, as follows:

THE COURT: Your full name, sir?
THE WITNESS: Donald R. Carter.

DIRECT EXAMINATION

BY MR. GOTT:

Q Mr. Carter, who do you work for?
A I am employed by the United States Customs
[fol. 113] Agency Service.
Q In what capacity?
A Customs Port Investigator.

* * * *

[fol. 114] BY MR. GOTT:

Q Mr. Carter, were you present at this address of Johnny Sabbath's there on the 20th of February, 1966 at the time he was arrested?
A Yes, sir.
Q Will you tell us when you first saw the man and what happened after that?
A My first contact or first visual contact with Mr. Sabbath was in the apartment where he resided. Agent Hopkins and I both entered the apartment approximately at the same time. Agent Hopkins was right in front of me, and I was directly in back of him. I observed Mr.
[fol. 115] Sabbath seated on a couch where Agent Hopkins had placed him in the diagram to my left here.
At the time that I saw Mr. Sabbath, his right hand was in the cushion, underneath the cushion of the particular couch he was sitting on, and at the time that I entered, I observed him bring his hand out from underneath the cushion and place it on his right knee.
Mr. Jones was seated in the chair, also in the same diagram.
Q What further happened?
A I took Mr. Sabbath off the couch, placed him against the wall which was approximately where the chair where

Mr. Jones was sitting, just to the left of Mr. Jones' chair, placed handcuffs on him, and then turned Mr. Sabbath around where I observed Mr. Henry retrieve a rubber contraceptive from the cushion of the couch where Mr. Sabbath was sitting.

Q Now, did you have anything in mind in moving him away from the couch?

A Yes, sir, I didn't know particularly what was underneath the cushion. My feeling was that possibly it could have been a weapon of some type.

Q You were watching that couch when you moved him away?

A Yes, sir.

Q How soon was the package removed?

A In a matter of thirty seconds.

[fol. 116] Q Now, what further happened concerning this defendant, or Mr. Jones, if anything?

A I assisted—correction—Mr. Sabbath was placed in a chair. Mr. Jones—during this time when I had Mr. Sabbath, I don't recall what other officer, but one of the other federal officers which assisted us in the case had taken Mr. Jones approximately the same time I had Mr. Sabbath and placed him in handcuffs. Both subjects were then seated in the front room of the apartment where a physical search of the apartment was taking place at this time by numerous officers.

Q Were there any arrests made at that time?

A Mr. Sabbath and Mr. Jones were both placed under arrest.

Q Maybe I'm confused. I thought Mr. Jones was already under arrest.

A He was at the time, but again he was placed under arrest in the company of Mr. Sabbath.

Q Why was that?

A Mainly for Mr. Jones' protection, possibly at a later date thinking—if I may clarify myself—a lot of time, to—

Q Wait a minute. Let me change my—

You wanted Mr. Sabbath to think you were arresting Mr. Jones at that time, too.

A That is correct, yes.

Q To make it look good.

[fol. 117] A Yes.

Q Now, did Mr. Jones leave the apartment at that time, or in the relatively near future?

A No, Mr. Jones was in the apartment, oh, for a number of minutes. I don't know how long, but he was there throughout most, the whole procedure of the searching of the apartment. I never observed him to leave the apartment the whole time I was there and I was there close to an hour, I guess.

Q What did you find in the search, if anything, of the apartment; I'm talking about.

A Returning from the bedroom, there was a closet just directly off the bedroom. In the closet numerous articles of clothing—men's apparel, some women's apparel —I found a box containing small rubber ballons. In the box also were aluminum foil cut into squares approximately one and a half, two-inch squares.

Also in this box was small rubber bands. Also found in the kitchen, I believe in the bar, luncheon bar-type thing, was another large box containing numerous small rubber ballons.

Again in the kitchen was found more aluminum foil squares cut in the small inch and a half, two-inch squares, in a stack, plus in the bedroom I found in between the mattress and innersprings approximately $500 in cash, and in the dresser drawer in the bedroom I found approximately 300 Dexamyl tablets or spatulas which were [fol. 118] not in the prescription bottles, just in the box.

Q Now, back to these squares of aluminum, ballons, and rubber bands, in your experience, being qualified as an expert in the narcotic field, what does this mean to you?

A The presence of aluminum foil cut in that particular fashion, being about an inch and a half or two-inch squares, it is my opinion that these squares were to be used to contain, put a narcotic substance in. They are folded in a particular way as to not spill the substance that is placed in these little aluminum foil containers, which would contain approximately five milligrams of narcotics generally. The street language would be a cap, what they would call a cap, a five milligram capsule. This

is folded and sometimes a rubber band is wrapped around the particular piece of aluminum foil to also keep it intact.

Q What about the balloons?

A The balloons are also used by numerous narcotic dealers to conceal narcotics in. I have seen them cut the bottom portion of the balloon off leaving a piece of the balloon approximately an inch long. The narcotic is placed in there. When it is to be taken out—it is rolled, the rubber band is placed around it to hold it from the narcotics falling out—and when it is to be taken out, they take a portion of the balloon, place it on their finger and peel the balloon down making the substance fall out [fol. 119] on whatever they are going to put it onto, a piece of paper. This way they also get all the narcotics inside the balloon off.

Q These aluminum foil sections or squares—are they used for any particular kind of narcotics?

A Generally cocaine.

Q Now, was the aluminum foil, rubber bands, and balloons all in the same box?

A Yes, sir.

* * * *

[fol. 121] MR. BRADLEY: Your Honor, I would like to place Mr. Sabbath back on the stand.

THE COURT: All right. Certainly.

JOHNNY SABBATH,

the defendant herein, was called as a witness in his own behalf, and having previously been sworn, testified in surrebuttal as follows:

DIRECT EXAMINATION

BY MR. BRADLEY:

Q Mr. Sabbath, will you again tell us your business [fol. 122] or occupation.

A My business is maintenance—carpet cleaning, painting, window cleaning, et cetera.

Q You work for yourself?

A Yes, sir.

Q You heard the testimony about some balloons being found in your apartment?

A Yes, sir.

Q And do you know how many balloons you had?

A No, I don't, as far as the number is concerned, but I bought the child—they come in bags, 29 cents.

Q These balloons were for your child?

A Yes, sir.

Q You also heard some testimony here by Mr. Carter who qualified as an expert or it was stipulated he was an expert with regard to some pieces of tinfoil found in your apartment.

A Yes, sir.

Q Will you tell the jury what those pieces of tinfoil are used for?

A Yes, sir, I will. I clean carpets and when I clean the carpet, naturally I have to have something to go under the legs of the couches and chairs and I have these cut and when I clean the carpet I place the carpet on top of this and this will prevent the chair or the leg to rust the carpet.

Q In other words, to prevent the cleaning material [fol. 123] put on the rugs from getting on the furniture?

A Yes, sir.

Q And you had some rubber bands there. What were they for?

A You put—in other words, this is the leg of a chair. You put the foil under the chair and you wrap it around and let it stay on for three days, and the carpet should dry within three days and then you take this off and there is no spot on the carpeting.

MR. BRADLEY: I have nothing further.

THE COURT: All right.

* * * *

[fol. 124]

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

No. 36238-Criminal

[File endorsement omitted]

UNITED STATES OF AMERICA, PLAINTIFF

vs.

JOHNNY SABATH, DEFENDANT

VERDICT—June 16, 1966

We, the Jury in the above entitled cause, find the defendant JOHNNY SABATH, Guilty as charged in count 1 of the Indictment; and Guilty as charged in count 2 of the Indictment.

/s/ Raymond E. Smith
Foreman of the Jury

Dated: June 16, 1966
At San Diego, California.

[fol. 125]

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

No. 36238-Criminal

UNITED STATES OF AMERICA

v.

JOHNNY SABBATH

JUDGMENT AND COMMITMENT—July 25, 1966

On this 25th day of July, 1966 came the attorney for the government and the defendant appeared in person and [1] by counsel, John Bradley.

IT IS ADJUDGED that the defendant has been convicted upon his plea of [2] not guilty and a verdict by a Jury of guilty of the offense of smuggling and concealing cocaine, in violation of 21 USC 174, as charged in Counts 1 and 2 of the Indictment in two counts, and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of [4] ten (10) years on each of Counts 1 and 2 to run concurrently.

IT IS ADJUDGED that [5] on motion of the U.S. Attorney the bond of this defendant is exonerated.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States

Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ Fred Kunzel
FRED KUNZEL
United States District Judge.

Filed July 25, 1966
JOHN A. CHILDRESS, Clerk

By /s/ Hal H. Kennedy,
HAL H. KENNEDY,
Deputy Clerk.

[fols. 126-127]

MR. JOHNNY SABBATH, IN PRO PER
1170 East 68th Street
Los Angeles, California
Telephone: 5887095

DEFENDANT, IN PRO PER

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT
CENTRAL DIVISION

Case Number: 36238

[File endorsement omitted]

UNITED STATES OF AMERICA, PLAINTIFF

vs.

JOHNNY SABBATH, DEFENDANT

NOTICE OF APPEAL—filed July 25, 1966

TO: The Clerk of the above-entitled Court, to the above-named Plaintiff, and to the Office Of The U. S. Attorney, Department Of Justice:

YOU AND EACH OF YOU WILL PLEASE TAKE NOTICE AND NOTICE IS HEREBY GIVEN that the Defendant in the above-entitled action hereby Appeals to the United States Circuit Court Of Appeals, Non-Circuit, from the JUDGMENT of conviction herein entered on the 17th day of May, 1966, for violation of Section 174, of Title 21, US Code Annotated, and from the whole thereof.

Dated: This 25th day of July, 1966.

/s/ Johnny Sabbath
Defendant, In Pro Per

IT IS ORDERED THAT THE DEFENDANT HEREIN BE RELEASED UPON THE POSTING OF $10,000 BOND, PENDING APPEAL HEREIN.

/s/ Fred Kunzel
Judge, Federal Court

[fol. 128]

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 21,353

JOHNNY SABBATH, APPELLANT

vs.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court
for the Southern District of California
Central Division

OPINION—June 27, 1967

Before: CHAMBERS and BARNES, Circuit Judges; and SMITH,* District Judge.

SMITH, District Judge:

Defendant, convicted on one count of importing cocaine, and on a second count of concealing and facilitating the transportation of the same cocaine in violation of 21 U.S.C. § 174, appeals from the judgment of conviction, asserting as error the admission of evidence seized at the time of his arrest.

Unless made as an incident of a lawful arrest the seizure was invalid on fourth amendment grounds because it was accomplished as the result of a search without a warrant. The arrest in turn depends upon whether the arresting officers had reasonable cause to believe that the defendant was committing, or had committed a felony.[1] [fol. 129] The facts are these: On February 19, 1966, one William Jones was searched at the Mexican border and found to be in possession of a condom containing

* Russell E. Smith, United States District Judge, District of Montana, sitting by designation.

[1] 26 U.S.C. § 7607; Spurlock v. United States, 9 Cir. 1961, 295 F. 2d 387.

about an ounce of cocaine. He told the customs officers that he had been taken to Mexico by defendant in defendant's car and promised $100.00 if he would bring the cocaine, which defendant gave to him, back to the United States. Jones had in his possession a card with the word "Johnny" and the number "758-9794", written upon it. On the next day a Customs Investigator dialed Los Angeles 758-9794 whereupon Jones talked over the telephone to a male at the other end of the line whom he addressed as Johnny and to whom he identified himself as "B. J." Jones stated that he still had his thing. The person at the other end asked if Jones had had any trouble getting through the line and Jones said "no". The party at the other end then said, "Well, I had a little trouble down there but I'll tell you about that when I see you." Jones asked the other person if he was going to be home and receiving an affirmative answer said, "All right, I'm on my way up. I'll see you in a little while." The federal officer then placed a radio transmitter device on Jones and accompanied him to defendant's apartment. Jones entered the apartment with the cocaine and a customs agent by radio receiver monitored the subsequent conversation.[2] Because of the interference from a phonograph which was running in the apartment, only parts of the conversation were heard. The officer did hear a woman answer the door and heard Jones ask if Johnny was in. The officer heard the female voice respond, "Yes, just a minute"; heard a male voice saying "Did you have any problems getting through the line"; and heard Jones respond "No" and something about a package. In the meantime Jones delivered the cocaine to defendant. Then the agent knocked, waited a few seconds and then entered the apartment through the closed but unlocked door. Defendant, who was seated on a couch, put his hands beneath the cushions and then pulled them out. Defendant was then arrested. The officer searched the couch at the point where defendant's hands had been and found the condom containing the cocaine. A subsequent search of the apartment disclosed a quantity of tinfoil squares and balloons.

[2] The admission of the evidence obtained by the transmitting and receiving equipment was not made the basis of an objection in the trial court nor was it specified as error or argued to be error in this court.

[fol. 130]

Information from an informer not known to be reliable does not constitute probable cause for an arrest without a warrant. If, however, by the time of the arrest there has been such corroboration of the informer's information to warrant a man of reasonable caution in the belief that an offense has been or is being committed, then probable cause does exist.[3] Each case turns largely on its own facts. By the time the arrest was made and apart from anything said by Jones, the officer knew that Jones had brought narcotics over the border, that he had a card with defendant's telephone number in his possession, that defendant knew Jones and was willing to receive him in his home, that defendant knew that Jones had been across the border, that defendant himself had been near the border and that Jones and defendant had some mutual interest in a thing or package. These facts are sufficient to distinguish this case from Castillon v. U.S., 9 Cir. 1962, 298 F. 2d 256, and Wong Sung v. U.S., 9 Cir. 1961, 288 F. 2d 366, rev'd 371 U.S. 471 (1963). There was probable cause.

Defendant further contends that even if there was probable cause for the arrest, the failure of the arresting officers to identify themselves and request permission to enter, made the arrest unlawful and tainted the search. It is settled that the method of entry into a dwelling, even where there is a power to arrest, may taint the arrest and the subsequent search. Miller v. United States, 357 U.S. 301 (1958).

It is not clear just what law sets the standards which govern an officer's entry into a dwelling for the purpose of making an arrest. When the arrest is made by a state officer for a federal offense, it has been said that the arrest is to be tested by the law of the state.[4] Some courts

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[3] Rodgers v. U. S., 9 Cir. 1959, 267 F. 2d 79.

[4] United States v. DiRe, 332 U.S. 581 (1948) where the arrest was made by a state officer accompanied by an O.P.A. investigator who had no power of arrest. Johnson v. United States, 333 U.S. 10 (1948), where the arrest was made by a Seattle police officer. Williams v. United States, 9 Cir. 1959, 273 F. 2d 781, where the

relying on United States v. DiRe, 332 U.S. 581 (1947), have held that arrests by federal officers for federal of-
[fol. 131] fenses, in the absence of a federal statute, are governed by state law.[5] There is no statute which expressly provides for the method of entry by federal officers who arrest without a warrant. Section 3109 of Title 18 U.S.C. does prescribe the method of entry in the execution of a search warrant,[6] and we believe that the effect of Miller v. United States, supra, is to make this statute applicable to arrests by federal officers for federal offenses.[7] So we treat the problem as one of federal law.[8]

If the entry made by opening a closed door without the necessary statutory formality was a breaking, then the federal law was violated and the arrest was unlawful. We turn to that problem:

The case[9] holding that any entry is a breaking unless there is permission has been repudiated in this Circuit, and it is the rule here that an entry through an open door is not a breaking, even though there be no permission.[10] An entry gained by ruse or deception unassociated with force is not a breaking.[11] Where officers without the

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arrest was made by a California police officer. Miller v. United States, 357 U.S. 301 (1958), may cast some doubt upon this language even as to state officers. See the dissenting opinion.

[5] Coplon v. United States, D.C. Cir. 1951, 191 F. 2d 749; Janney v. United States, 4 Cir. 1953, 206 F. 2d 601; United States v. Perez, 2 Cir. 1957, 242 F. 2d 867.

[6] The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant. 18 U.S.C. § 3109.

[7] We realize that Miller dealt with an arrest by an officer of the District of Columbia, but we believe that the result was based on § 3109.

[8] Dickey v. United States, 9 Cir. 1964, 332 F. 2d 773.

[9] Keiningham v. United States, 109 U.S. App. D.C. 272, 287 F. 2d 126, 1960.

[10] Ng Pui Yu v. United States, 9 Cir. 1965, 352 F. 2d 626.

[11] Leahy v. United States, 9 Cir. 1959, 272 F. 2d 487.

authority of the tenant secure a pass key from the landlord and enter by means of the key, such is a breaking.[12]

We told that an entry made through a closed but unlocked door is not a breaking.[13] We realize that the distinction between using a door knob to turn a latch, and [fol. 132] using a key obtained without permission to turn a bolt, may be slight. It may be that a door which is locked does give more warning of a desire for privacy than one which is not locked; but, in any event, we are of the opinion that the word "break" has been taken far enough from the connotations of force which usually accompany it,[14] and we are not willing to take it any further for the purpose of enlarging a rule of exclusion. The arrest was lawful.

It is urged that the district court erred in admitting evidence in rebuttal which concededly might have been admitted in the government's case in chief. This is a matter within the discretion of the trial court,[15] and under the circumstances here we find no abuse of discretion.

The judgment appealed from is affirmed.

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[12] Munoz v. United States, 9 Cir. 1963, 325 F. 2d 23.

[13] United States v. Bowman, D.D.C. 1956, 137 F. Supp. 385. This result is in accord with that reached in Williams v. United States, supra, note 4, although as indicated that case was decided on the basis of California law.

[14] Webster's Third New International Dictionary (1966).

[15] United States v. Crowe, 7 Cir. 1951, 188 F. 2d 209.

[fol. 133]

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 21,353

JOHNNY SABBATH, APPELLANT

vs.

UNITED STATES OF AMERICA, APPELLEE

JUDGMENT—Filed and entered June 27, 1967

APPEAL from the United States District Court for the Southern District of California, Central Division.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Central Division and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

[fol. 134]

SUPREME COURT OF THE UNITED STATES

No. ——, October Term, 1967

JOHNNY SABBATH, PETITIONER

vs.

UNITED STATES

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI—July 28, 1967

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including August 26, 1967

/s/ Byron R. White
Associate Justice of the
Supreme Court of the
United States

Dated this 28th day of July, 1967

[fol. 135]

SUPREME COURT OF THE UNITED STATES

No. 566 Misc., October Term, 1967

JOHNNY SABBATH, PETITIONER

v.

UNITED STATES

On petition for writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND GRANTING PETITION FOR WRIT OF CERTIORARI—December 11, 1967

On consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 898 and placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1968 291208 608

SUPREME COURT, U. S.

MAR 21 1968

JOHN F. DAVIS, CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 898

JOHNNY SABBATH,

Petitioner,

—v.—

UNITED STATES,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONER

MURRAY H. BRING
1229 Nineteenth Street, N.W.
Washington, D.C. 20036
Attorney for Petitioner

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 898

JOHNNY SABBATH,

Petitioner,

—v.—

UNITED STATES,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONER

Opinion Below

The opinion of the Court of Appeals for the Ninth Circuit (R. 54-58)[1] is reported at 380 F.2d 108.

Jurisdiction

The judgment of the Court of Appeals was entered on June 27, 1967 (R. 59). On July 28, 1967, Mr. Justice White

[1] The parties have agreed through Stipulation on those portions of the Record below which shall appear in the printed Appendix. All references in this Brief to that Appendix will be designated by the letter "R."

extended the time for filing a petition for a writ of certiorari to and including August 26, 1967 (R. 60). The petition, *in forma pauperis*, was filed on August 25, 1967, and was granted on December 11, 1967 (R. 61). The jurisdiction of this Court is conferred by 28 U.S.C. § 1254(1).

Question Presented

Petitioner was arrested in his apartment by federal customs officers, who discovered narcotics and other incriminating evidence in the course of a search of the apartment conducted after the arrest. The question presented is whether the seized evidence should have been excluded at petitioner's trial for alleged violations of the federal narcotics laws, because the arrest and the search leading to the seizure were unlawful on either of the following two grounds:

(1) That the arresting officers entered petitioner's apartment to make the arrest by opening the closed but unlocked door leading into the apartment, without first giving notice of their authority and purpose and being refused admittance, as is required by 18 U.S.C. § 3109; or

(2) That the arrest and the resultant search were made without a warrant of any kind, at night, after an unconsented to entry into petitioner's home, under circumstances which do not excuse the officers' failure to obtain a warrant.

Constitutional Provision and Federal Statute Involved

The Fourth Amendment to the Constitution of the United States provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Section 3109 of Title 18 of the United States Code, 62 Stat. 820, provides:

> "The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant."

Statement

On Saturday, February 19, 1966, a Mr. William Jones was stopped by Customs Inspector Yates at the San Ysindro, California port of entry into the United States, while attempting to cross the border from Mexico as a pedestrian (R. 5). Inspector Yates searched Jones and discovered a condom containing about an ounce of cocaine concealed on Jones' person (R. 5). When questioned by

customs officers, Jones initially stated that he was the only person involved in transporting the cocaine from Mexico to the United States (R. 14). After being in custody for some three or four hours—during which time the customs agents asked Jones "quite a few questions" (R. 15)—he altered his explanation and told the agents that he was bringing the narcotics back for someone named "Johnny" in Los Angeles (R. 14-15).[2]

Two Customs Port Investigators then took Jones to Los Angeles, where they met with a number of Los Angeles customs officers (R. 42). At approximately 2:45 a.m. on the morning of February 20, 1966, Jones, in the presence of customs agents, dialed a Los Angeles telephone number (R. 42-43). The call was not answered (R. 43). The number called was written on a card which Jones was carrying in his wallet at the time of his arrest, and on which also appeared the name "Johnny" (R. 8, 43). Between 2:45 a.m. and 5:00 a.m., three additional calls were placed to the same Los Angeles number, but no one answered any of those calls (R. 43). Thereafter, the agents apparently took Jones from Los Angeles back to the San Diego area (R. 42-44).

At 3:00 p.m. on the afternoon of February 20, 1966, Customs Port Investigator Gore dialed the Los Angeles number again; this call was placed from the Narcotics Division of the San Diego Sheriff's Office (R. 44). A male voice answered the phone (R. 44). Jones addressed that

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[2] At the trial, Jones testified that Johnny had driven him to Mexico and had promised to give him $100 for transporting the cocaine across the border (R. 11-12). It appears from the Record that Jones informed the agents of these facts (R. 25).

person as "Johnny" and identified himself as "B.J." (R. 44).[3]

During the conversation, Jones told "the party on the other end" that he was still in San Diego and that he still had "his thing" (R. 44, 8). The other party inquired whether Jones had experienced "any trouble getting through the line" (R. 44, 8). When Jones indicated that he had not, the person identified only as "Johnny" replied that he had encountered some trouble while in Mexico (R. 44).[4] Jones then inquired whether "Johnny" planned to remain at home, and, upon receiving an affirmative answer, said that he would come to Johnny's apartment (R. 44). Jones had been to "Johnny's" apartment before and knew the location, but he did not know the specific address (R. 10, 31, 8, 13).

There is nothing in the Record to suggest that the federal officers took any independent action to corroborate Jones' story or the cryptic remarks overheard during the telephone conversation between Jones and "Johnny." Apparently, the officers did not even make a routine check of police files to determine whether Jones—whom they had not known prior to the evening of his arrest—had a prior narcotics record (R. 26-27). Nor was any effort expended

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[3] Two customs agents listened to the conversation between Jones and "Johnny," and a recording of the conversation was made (R. 44). The recording was not offered at the trial, but one of the agents testified concerning the conversation he overheard (R. 5, 44).

[4] At the trial, petitioner's uncontradicted testimony was that during his visit to Mexico he had been falsely arrested by the Mexican authorities who had tried to confiscate his money (R. 33-36). He further testified that the Mexican police ultimately released him from custody, and that his inquiry to Jones about "trouble at the line" was prompted by his own experience with the Mexican authorities (R. 38).

to obtain further knowledge about "Johnny" or to trace the telephone number which Jones had called.

Instead, between 7:30 p.m. and 8:15 p.m. on the evening of February 20, 1966, four or five federal customs officers brought Jones to the apartment building in which petitioner lived (R. 7, 19, 21, 37, 44). They did not have a warrant authorizing petitioner's arrest or permitting a search of his apartment (R. 26). The agents then outfitted Jones with a radio transmitting device (R. 16, 19).

Jones proceeded to petitioner's apartment alone, while the customs agents took up positions outside the building (R. 9, 20). Jones knocked on the door of the apartment, and the door was opened by a woman who was visiting petitioner (R. 9, 20, 36-37). The woman admitted Jones to the apartment and closed the door (R. 9, 20, 37). After being admitted into the apartment, Jones waited in the living room while the woman went back to the bedroom to call petitioner (R. 9, 36-37). Petitioner joined Jones in the living room, while the woman remained in the bedroom (R. 9, 40).

In the meantime, the customs agents were attempting to make use of the transmitter which had previously been placed on Jones (R. 20-21). Through that device, they heard Jones knock on the door and ask the woman who answered if "Johnny" was at home (R. 20). They heard the woman answer "yes" and then the sound of footsteps (R. 20). The agents then heard a male voice talking to Jones (R. 20). However, because stereo music was being played in the apartment, they were able to hear only fragmentary portions of the ensuing conversation (R. 20-21). Among the fragments which they heard was an inquiry

"something to the effect: 'Did you have any problems getting through the line?'", and Jones' response in the negative (R. 21). They also heard one of the voices mention the word "package," and a garbled reply from the other person (R. 21).[5]

Since the agents "were not getting real good reception on the electronic device due to the loud music, [they] decided it was time to go into the apartment" (R. 21). Four agents proceeded to the apartment, and one of them knocked on the door (R. 21). None of the agents announced his authority or purpose. They "waited a few seconds," during which time no answer came from within (R. 21). The agent who knocked then "opened the unlocked door and came into the apartment" (R. 21).[6] He was accompanied by at least one of the other agents (R. 45). The agents entered the apartment with their guns drawn (R. 26, 41).

As the agents entered, they saw Jones sitting on a chair next to the couch in the living room and another man (petitioner) sitting on the couch, dressed only in an undershirt and a pair of boxer shorts (R. 21-23, 25, 45-46). The agents testified that they saw petitioner sitting with his right hand "between" or "underneath" the cushions of the

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[5] The agents attempted to make a recording of the conversation picked up over the transmitter (R. 26). If such a recording was made, it was not offered at the trial (R. 5). Instead, the agents testified as to what they had overheard by use of the transmitter (R. 20-21).

[6] One of the agents testified that approximately 5 minutes elapsed from the time Jones went to petitioner's apartment to the time they entered the apartment (R. 21). Petitioner estimated that the amount of time between those two events was "five to eight, ten minutes" (R. 39).

couch, and that shortly after their entry, he withdrew his hand from beneath the cushions and placed it on his right knee (R. 23-24, 45). The officers then immediately arrested both Jones and petitioner, removed petitioner from the couch, placed him against the wall, handcuffed him, and searched both Jones and petitioner (R. 24, 45-46).

A third agent then immediately searched the couch, and found the rubber contraceptive containing the cocaine under the cushion on which petitioner had been sitting (R. 24, 46). The agents also conducted a general search of the apartment (R. 47). In the bedroom, they found some small rubber balloons, a number of one-and-a-half to two inch aluminum foil squares, approximately $500, and about 300 Dexamyl tablets. More balloons and aluminum foil squares were found in the kitchen (R. 47).[7]

Jones was not in possession of the promised $100 at the time of the arrests in petitioner's apartment (R. 25). He had not received this payment because—in his own words—he "forgot about it" (R. 11, 13).

On March 2, 1966, petitioner and Jones were indicted on two counts. The first charged them with knowingly importing and bringing approximately one ounce of cocaine into the United States from Mexico, in violation of 21

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[7] None of the evidence other than the container of cocaine was introduced at the trial. However, there was considerable testimony concerning the balloons and aluminum foil squares (R. 47-49). Conflicting explanations were offered for the presence of the balloons and aluminum foil squares in petitioner's apartment. One of the officers testified that both the balloons and the aluminum squares could be used as containers for narcotics (R. 47-48). Petitioner testified that the balloons had been bought for his son, and that the aluminum foil squares were used in his carpet cleaning business to rest the legs of furniture on so that the cleaning substances put on the carpets would not soil the furniture (R. 48-49).

U.S.C. § 173;[8] the second charged them with knowingly concealing and facilitating the transportation and concealment of unlawfully imported cocaine, in violation of 21 U.S.C. § 174[9] (R. 2-3).

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[8] Section 173 of Title 21 of the United States Code provides:

"It is unlawful to import or bring any narcotic drug into the United States or any territory under its control or jurisdiction; except that such amounts of crude opium and coca leaves as the Commissioner of Narcotics finds to be necessary to provide for medical and legitimate uses only may be imported and brought into the United States or such territory under such regulations as the Commissioner of Narcotics shall prescribe, but no crude opium may be imported or brought in for the purpose of manufacturing heroin. All narcotic drugs imported under such regulations shall be subject to the duties which are now or may hereafter be imposed upon such drugs when imported.

"Any narcotic drug imported or brought into the United States or any territory under its control or jurisdiction, contrary to law, shall (1) if smoking opium or opium prepared for smoking, be seized and summarily forfeited to the United States Government without the necessity of instituting forfeiture proceedings of any character; or (2) if any other narcotic drug be seized and forfeited to the United States Government, without regard to its value, in the manner provided by sections 514 and 515 of Title 19, or the provisions of law hereafter enacted which are amendatory of, or in substitution for, such sections. Any narcotic drug which is forfeited in a proceeding for condemnation or not claimed under such sections, or which is summarily forfeited as provided in this subdivision, shall be placed in the custody of the Commissioner of Narcotics and in his discretion be destroyed or delivered to some agency of the United States Government for use for medical or scientific purposes."

[9] Section 174 of Title 21 of the United States Code provides:

"Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237 (c) of the Internal Revenue

Petitioner was tried alone.[10] At the trial, his court-appointed counsel objected to the admission into evidence of the cocaine seized in petitioner's apartment (R. 28). The objection was based on grounds (1) that the agents had gone to the apartment "without a warrant, with the intention of arresting the occupants"; (2) that the agents lacked probable cause for making the arrest, in that the only basis for the arrest was "the information given . . . by Jones", who was not "a reliable informant"; and (3) that the agents were not justified in "breaking into [petitioner's] apartment without a warrant" (R. 28). The court dismissed the objection and denied the motion for exclusion (R. 29).

On appeal from his conviction, petitioner was represented by a second court-appointed counsel. Petitioner again challenged the receipt of the cocaine into evidence. The Court of Appeals for the Ninth Circuit affirmed the conviction, holding, *inter alia*, that the federal officers had probable cause to make the arrest. The Court rested its holding on the following facts:

> "By the time the arrest was made and apart from anything said by Jones, the officer knew that Jones had brought narcotics over the border, that he had a card with defendant's telephone number in his possession,

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Code of 1954), the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than $20,000.

"Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

[10] The Record does not indicate whether Jones was ever tried.

that defendant knew Jones and was willing to receive him in his home, that defendant knew that Jones had been across the border, that defendant himself had been near the border and that Jones and defendant had some mutual interest in a thing or package." (R. 56).

With respect to petitioner's claim that the arrest was unlawful because the agents had not announced their authority and purpose before entering the apartment—in accordance with the requirement of 18 U.S.C. § 3109—the Court agreed that the arrest was unlawful "if the entry made by opening a closed door without the necessary statutory formality was a breaking" (R. 57). However, the Court concluded, as follows, that the statute had not been violated:

> "We hold that an entry made through a closed but unlocked door is not a breaking. We realize that the distinction between using a door knob to turn a latch, and using a key obtained without permission to turn a bolt, may be slight. It may be that a door which is locked does give more warning of a desire for privacy than one which is not locked; but, in any event, we are of the opinion that the word 'break' has been taken far enough from the connotations of force which usually accompany it, and we are not willing to take it any further for the purpose of enlarging a rule of exclusion. The arrest was lawful." (R. 58).

Summary of Argument

The Court of Appeals erred in holding petitioner's arrest lawful. Accordingly, the evidence seized during the search of his apartment which followed the arrest should have been suppressed at the trial.

1. Section 3109 of Title 18 of the United States Code governs the manner in which a federal officer may break into a private dwelling to effect an arrest. It requires that the officer must first give "notice of his authority and purpose" and be "refused admittance" before he may "break" into the premises. In *Miller* v. *United States*, 357 U.S. 301, 313 (1958), this Court recognized that because the announcement requirement of the statute has become "deeply rooted in our heritage," it "should not be given grudging application."

The Court of Appeals below failed to heed this Court's admonition. By holding that the officers' unannounced entry into petitioner's apartment through a closed but unlocked door did not constitute a breaking within the meaning of the statute, the court below relied upon the untenable theory that the use of "force" is an indispensable element of a breaking. This result is inconsistent with the legislative history of the statute, with the basic objectives of the announcement requirement contained in Section 3109, and with the decisions of other federal courts which have considered the question.

The legislative history and common law antecedents of Section 3109 disclose the error of the Court of Appeals' ruling. Section 3109 first appeared as part of the Espionage Act of 1917. The announcement provision of the Act was

based upon the existing law of New York, which followed the common law rule that a police officer committed a breaking whenever he entered in a manner which would constitute a breaking in relation to the crime of burglary. The New York law was equally clear, as was the common law, that entry into a dwelling by any means—including the mere turning of an unlocked door knob—was sufficient to support a conviction for burglary. It is therefore clear that by referring to the law of New York, Congress intended to incorporate the common law rule that entry through a closed but unlocked door constitutes a breaking within the meaning of Section 3109.

The Court of Appeals' decision is also at odds with the policy considerations which underlie the statute. The announcement requirement embodies a rule of conduct which is designed to give effect to the substantive guarantees of the Fourth Amendment. Specifically, it seeks (1) to preserve the individual's right to be free from unexpected, frightening, and embarrassing intrusions into the privacy of his home, (2) to compel police conduct which is consonant with the presumption of innocence, and (3) to avoid the unnecessary violence which frequently accompanies unannounced invasions of private dwellings. The pursuit of these objectives is no less important when the police make an unannounced entry through a closed but unlocked door, than when they must force the door bolt in order to gain access. In each case, the closing of the door signifies the occupant's desire to enjoy the privacy of his home; in each case, the occupant is entitled to a presumption of innocence and to the assumption that he will voluntarily open his door to officers who announce their authority and lawful purpose; and in each case, the unannounced entry of

the police may result in an unnecessarily violent confrontation.

The distinction between locked and unlocked doors drawn by the court below has been rejected by other federal courts. For example, the Circuit Court of Appeals for the District of Columbia has properly noted that the protection afforded by Section 3109 should be "governed by something more than the fortuitous circumstance of an unlocked door." *Keiningham* v. *United States*, 287 F.2d 126, 130 (1960). In another context, this Court has also recognized that entry through a closed but unlocked window constitutes a breaking. *Chapman* v. *United States*, 365 U.S. 610, 616 (1961).

Section 3109 establishes an important standard governing the conduct of federal officers who break into private dwellings to effect arrests or searches. The Court of Appeals below has interpreted the statute in a manner which would permit a substantial relaxation of that standard, and which is inconsistent with the basic objectives served by the announcement requirement. Its decision should be reversed.

2. The nighttime arrest of petitioner in his home was unlawful, in view of the officers' failure to seek a warrant, under circumstances which do not excuse their failure to do so.

This is a case in which the manner, timing, and place of the arrest were entirely within the control of the federal officers. Prior to arresting petitioner, they had already seized the narcotics which were allegedly being delivered to him, and had arrested Mr. Jones, the person who claimed to

have been hired to make the delivery. An entire day elapsed between the arrest of Jones and the agents' arrival at petitioner's apartment. During that time, they could easily have attempted to secure a warrant authorizing petitioner's arrest. They chose not to do so. Instead they proceeded to petitioner's apartment, outfitted Jones with an electronic bug, and sent him into the apartment—apparently in the hope that they could arrest petitioner in possession of the narcotics. Within approximately five minutes thereafter, the officers entered the apartment, arrested petitioner, and conducted a general search of the premises.

In *Jones* v. *United States*, 357 U.S. 493, 498 (1958), the Court acknowledged that "whether the forceful nighttime entry into a dwelling to arrest a person reasonably believed within, upon probable cause that he had committed a felony, under circumstances where no reason appears why an arrest warrant could not have been sought, is consistent with the Fourth Amendment," presents a "grave constitutional question.". The Court declined to pass on the question there; petitioner urges that it do so here and reemphasize the importance of the warrant procedure by declaring petitioner's arrest unlawful due to the absence of a warrant.

This Court has frequently recognized the paramount role which the warrant procedure plays in protecting the individual from unreasonable police conduct. The significance of an independent judicial determination of probable cause is most obvious when the arrest is to be executed in a private dwelling, since the home has always been viewed as a preferred place whose "seal of sanctity" is not to be broken lightly.

Since recent decisions of this Court indicate that, under appropriate circumstances, probable cause may be based

on the credible hearsay statements of unidentified informants, and that, in limited situations, "mere evidence" may be seized during the search which accompanies the arrest, there is all the more reason to require that the magistrate's judgment—and not that of the police—should determine whether probable cause exists for the arrest and the search which usually follows. Otherwise, a substantial safeguard of individual liberty will be jeopardized.

A strict adherence to the warrant procedure also serves the legitimate interests of law enforcement. Recourse to the magistrate affords the police an opportunity for an impartial judgment as to their contemplated action and helps them avert improper conduct.

The federal officers in this case were obviously disinterested in securing a judicial imprimatur for their conduct. Despite ample opportunity to seek a warrant, they preferred instead to act on their own authority. The Court should not condone such complete defiance of the warrant procedure.

ARGUMENT

I.

The Court Below Erred in Holding That the Arrest of Petitioner in His Home by Federal Officers Who Entered the Premises by Opening a Closed but Unlocked Door Without First Announcing Their Authority and Purpose and Being Refused Admittance Was Lawful; the Evidence Seized in the Search Conducted After That Arrest Should Therefore Have Been Excluded at Petitioner's Trial.

It was undisputed at petitioner's trial that none of the federal officers who entered petitioner's apartment made an announcement of his authority or purpose before entering. Rather, one of them knocked on the door, waited a few seconds, turned the knob of the door, and walked into the apartment with his gun drawn. If the opening of a closed but unlocked door constitutes a "breaking," the arrest was clearly unlawful under 18 U.S.C. § 3109[11]—which authorizes

[11] It seems clear that the officers' conduct in this case should be measured by the standards set forth in Section 3109, and not by the law of California governing the execution of arrests. There is nothing in this Court's opinions in *United States* v. *Di Re*, 332 U.S. 581 (1948), or *Miller* v. *United States*, 357 U.S. 301 (1958), which compels a different conclusion. In *Di Re*, the Court merely held that the lawfulness of an arrest by a *state* officer for a federal offense should be tested by state law. While the Court did indicate in *Miller* that "the validity of the arrest of petitioner is to be determined by reference to the law of the District of Columbia," *id.* at 305-06, that result followed because—as in *Di Re*—the only officer who had authority to make the arrest involved there was a member of the local police force. *Id.* at 305. The Court specifically noted, however, that there was a similarity between the requirements of Section 3109 and those of the District of Columbia, and that its decision to grant certiorari was warranted because it was dealing with a "statute which is not confined in operation to the District of Columbia." *Id.* at 306. This statement clearly suggests that

a federal officer to "break open" an outer door of a house or apartment only if, "after notice of his authority and purpose, he is refused admittance." [12]

The common law antecedents and legislative history of Section 3109, the objectives which that statute was meant to serve, and the prior decisions of this Court and of other federal courts lead to only one conclusion, namely, that an unannounced entry by federal officers through the closed outer door of a private dwelling is an unlawful breaking within the meaning of the statute.

A. The Common Law Roots and Legislative History of Section 3109 Reveal the Error of the Lower Court's Ruling.

This Court has recently had occasion to acknowledge the common law underpinnings of the announcement requirement embodied in Section 3109. In *Miller* v. *United States*, 357 U.S. 301, 306-07, 308 (1958), the Court indicated that

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Section 3109 shall govern arrests made by federal officers for federal offenses—as the Court subsequently indicated in *Wong Sun* v. *United States*, 371 U.S. 471, 482-84 (1963). See *Ker* v. *California*, 374 U.S. 23, 40, n. 11 (1963).

Various federal courts, including the court below in this case, have accordingly held that federal agents making arrests in private dwellings for federal offenses are subject to the requirements of Section 3109. See, *e.g.*, *Munoz* v. *United States*, 325 F.2d 23 (9th Cir. 1963); *United States* v. *Nicholas*, 319 F.2d 697 (2d Cir.), *cert. denied*, 375 U.S. 933 (1963); *United States* v. *Sims*, 231 F. Supp. 251 (D. Md. 1964).

[12] Although Section 3109 deals specifically only with the execution of search warrants, this Court recognized—and the Government conceded—in *Miller* v. *United States*, 357 U.S. 301, 306 (1958), that "the validity of the entry to execute the arrest without warrant must be tested by criteria identical with those embodied in 18 U.S.C. § 3109, which deals with entry to execute a search warrant." See *Wong Sun* v. *United States*, 371 U.S. 471, 482-84 (1963).

> "From earliest days, the common law drastically limited the authority of law officers to break the door of a house to effect an arrest."
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> • • •
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> "Whatever the circumstances under which breaking a door to arrest for felony might be lawful, however, *the breaking was unlawful where the officer failed first to state his authority and purpose for demanding admission.*" (Emphasis supplied.)

Thus, as early as 1603, the principle was firmly established in the landmark decision in *Semayne's Case*, 5 Co. Rep. 91a, 11 E.R.C. 629, 77 Eng. Repr. 194, 195, that

> "In all cases where the King is party, the sheriff (if the doors be not open) may break the party's house, *either to arrest him*, or to do other execution of the K.'s process, if otherwise he cannot enter. *But before he breaks it, he ought to signify the cause of his coming, and to make request to open doors . . .*" (Emphasis supplied.)

Since its first promulgation in *Semayne's Case*, the requirement that an officer must announce his authority and purpose before forcefully entering a private dwelling has received widespread support from the commentators, has been judicially accepted by the courts of this country, and has been enacted into law by a majority of the state legislatures.[13] Indeed, this Court has recognized that the require-

[13] The completeness with which the requirement has been accepted by both English and American authorities is fully described in Mr. Justice Brennan's dissenting opinion in *Ker* v. *California*, 374 U.S. 23, 46-52 (1963). See also *Accarino* v. *United States*, 179 F.2d 456, 460-63 (D.C. Cir. 1949).

ment has become so "deeply rooted in our heritage" that it "should not be given grudging application." *Miller* v. *United States*, 357 U.S. 301, 313 (1958).[14]

Against this background, petitioner urges that the court below did, indeed, give "grudging application" to the statute when it held that the opening of a closed but unlocked door did not constitute a "breaking" within the purview of the statute. The legislative history of Section 3109 and the common law authorities are particularly instructive in this regard.

Prior to codification, the substance of Section 3109 appeared in Title XI of the Espionage Act of 1917, ch. 30, tit. XI, § 8, 40 Stat. 229. As the Conference Report on the

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[14] Nothing in the Court's opinion in *Ker* v. *California*, 374 U.S. 23 (1963), denigrates the fundamental importance of the prior announcement rule to the preservation of individual liberty. The Court there merely held that, in applying the requirement as a Constitutional mandate in state prosecutions, the states could excuse failure of compliance on the part of state officers "where exigent circumstances are present." *Id.* at 39. The question whether the "exigent circumstances" exception is applicable to the conduct of federal officers who fail to comply with the announcement requirement of Section 3109 was expressly reserved in *Miller* v. *United States*, 357 U.S. 301, 309 (1958). See also *Wong Sun* v. *United States*, 371 U.S. 471, 482 (1963).

Even assuming that the statute does permit such an exception, the exception would be wholly inapplicable to this case. The Record is devoid of any indication that the officers' unannounced entry into petitioner's apartment was justified by exigent circumstances. There was nothing to suggest to the police that petitioner was about to destroy any crucial evidence, or was even in a position to do so. In fact, when the agents broke in, they did not even know whether the cocaine had been passed from Jones to petitioner. Nor was there anything "furtive" in petitioner's conduct which would have justified their forceful and unannounced entry. *Ker* v. *California*, *supra* at 40. Finally, there was no indication whatever that anyone inside petitioner's apartment was "in imminent peril of bodily harm," that the officers had reason to believe that an escape might be attempted, or that petitioner already knew "of the officers' authority and purpose." *Id.* at 47 (dissenting opinion).

Act indicated, that title "was based upon the New York law on this subject and follows generally the policy of that law." H.R. Rep. No. 69, 65th Cong., 1st Sess. 20, 55 Cong. Rec. 3305, 3307 (1917).

New York had no unusual laws or policies dealing with the breaking of doors by police officers as of 1917. Rather, it followed the general common law rules of most jurisdictions in the United States, and analogized the breaking by a law officer to the breaking which occurs in a burglary.

Thus, at common law

> "What would be a 'breaking' of the outer door in burglary is equally a breaking by the sheriff when he enters to make a levy or when he, or any other officer, comes to serve any legal process." Voorhees, *Law of Arrest* § 172 (1904).

Accordingly, in an early case, the New York Supreme Court held that

> "What would be a breaking of the outer door in burglary, is equally a breaking by the sheriff." *Curtis* v. *Hubbard,* 1 Hill. 336, 338 (N.Y. 1841).

The definition of "breaking" in relation to the crime of burglary was well-defined both in New York and in other states. In the *Curtis* case, the New York court indicated that

> "It is enough that the outer door be shut. Then, merely opening it is a breaking, within the meaning of the law . . . .
>
> *"Lifting a latch is, in law, just as much a breaking, as the forcing of a door bolted with iron." Ibid.* (Emphasis supplied.)

Forty years later, this definition of breaking was enacted as Section 499 of the New York Penal Code of 1881. It provided, in pertinent part, as follows:

> "§ 499. 'Break' defined.—The word 'break,' as used in this chapter, means and includes,
>
> 1. Breaking or violently detaching any part, internal or external of a building; or,
>
> 2. Opening, for the purpose of entering therein, *by any means whatever,* any outer door of a building, or of any apartment or set of apartments therein separately used or occupied, or any window, shutter, scuttle or other thing used for covering or closing an opening thereto or therein, or which gives passage from one part thereof to another;" (Emphasis supplied.)[15]

Thereafter, the statute was interpreted several times by the courts of New York. In *People* v. *Gartland,* the Appellate Division stated that

> "Section 499 of the Penal Code defines the word 'break' as used in the statute, and declares that it includes *opening,* for the purpose of entering therein, *by any means whatever,* any outer door of a building or of any apartment . . . therein, used or occupied, . . . That definition is satisfied if the proof shows that the appellant opened, *by any means,* the outer door of the apartment . . . . If that door were shut at the time he made his entrance to the apartment, and he opened it *by any means whatever,* he was guilty of the offense."

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[15] New York Penal Code § 499 (1881), *as amended,* New York Penal Law § 400 (1909), *as amended,* L. 1937, ch. 688; *as amended,* L. 1953, ch. 84; *repealed by* Penal Law § 500.05 (1967).

30 App. Div. 534, 535, 52 N. Y. Supp. 352 (1898) (Emphasis supplied.)

In *People* v. *Toland,* a case which was decided only one year before Section 3109 was enacted by Congress, the New York Court of Appeals stated that

> "Nothing is better settled in the law of burglary than that the opening of a latched door constitutes a breaking sufficient to uphold a conviction. Indeed, *if the door is closed it is not necessary to constitute burglary that it should be latched.*" 217 N.Y. 187, 190-91, 111 N.E. 760, 761 (1916) (Emphasis supplied). See *People* v. *Walton,* 159 App. Div. 289, 290, 144 N.Y. Supp. 308, 309 (1913).

New York's definition of a breaking to include *any* entrance through a closed door conformed to the law of numerous other States and to English common law. See, *e.g., Grimes* v. *State,* 77 Ga. 762 (1886); *State* v. *Conners,* 95 Iowa 485, 64 N.W. 295 (1895); *State* v. *Groning,* 33 Kan. 18, 5 Pac. 446 (1885); *State* v. *Moore,* 117 Mo. 395, 22 S.W. 1086 (1893); *Rex* v. *Russell,* 1 Moody 377, 168 Eng. Rep. 1310 (1833); *Rex* v. *Haines,* Russ. & Ry. 451, 168 Eng. Rep. 892 (1821); *Rex* v. *Stock,* 2 Leach 1014, 168 Eng. Rep. 604 (1809). It is therefore not surprising that Professor Wilgus reached the following conclusion in his oft-cited article on arrests:

> "What constitutes 'breaking' seems to be the same [for a sheriff's entrance] as in burglary: lifting a latch, *turning a door knob,* unlocking a chain or hasp, removing a prop to, or pushing open, a closed door of entrance to the house,—even a closed screen door . . . ."

Wilgus, *Arrest Without a Warrant,* 22 Mich. L. Rev. 798, 806 (1924) (Emphasis supplied.)

In short, the Congressional reference to the New York law as the model for Section 3109 makes it clear that that Section was designed to incorporate, at the very least, the general common law understanding of what constituted a breaking in connection with the crime of burglary. The common law authorities and state court decisions cited above leave no room for doubt that, at common law, a breaking encompassed any opening of a closed door—regardless of the position of the door lock, bolt, or chain.

B. The Objectives Served by Section 3109 Require Compliance With the Announcement Provisions of the Statute, Even Though the Police Enter Through a Closed but Unlocked Door.

As this Court has stated on numerous occasions, the rules governing arrests and searches and seizures are not mere procedural formalities. *E.g., Stanford* v. *Texas,* 379 U.S. 476, 485 (1965); *McDonald* v. *United States,* 335 U.S. 451, 455 (1948). They were not created "to shield criminals nor to make the home a safe haven for illegal activities." *Ibid.* Nor have they been established without due recognition "of the reliance that society must place for achieving law and order upon the enforcing agencies of the criminal law." *Miller* v. *United States,* 357 U.S. 301, 313 (1958). Rather, as the Court said in *Wong Sun* v. *United States,* 371 U.S. 471, 484 (1963), these rules have been developed "in order to make effective the fundamental constitutional guarantees of sanctity of the home and inviolability of the person."

The requirement of Section 3109 is an essential part of the panoply of procedures which have been developed by Congress and this Court to enforce the substantive rights guaranteed by the Fourth Amendment. *Miller* v. *United States,* 357 U.S. 301, 313 (1958). Essentially, the announcement requirement of the statute seeks to accomplish three objectives, each of which is applicable to a case involving the entry by federal officers through a closed but unlocked door. The three objectives are (1) preservation of the individual's right to be free from unexpected, embarrassing, and frightening intrusions into the privacy of his home, (2) insistence upon police conduct which is consonant with the presumption of innocence, and (3) protection of the life and limb of the entering police officers, as well as of those occupying the dwelling.

(1) *Right to privacy*—As this Court recognized in *Miller* v. *United States,* 357 U.S. 301, 307 (1958), the announcement requirement of Section 3109 is intended to protect "the precious interest of privacy summed up in the ancient adage that a man's house is his castle." It establishes one of the essential preconditions for "a society which chooses to dwell in reasonable security and freedom from surveillance." *Johnson* v. *United States,* 333 U.S. 10, 14 (1948).

Surely, the security and privacy which each individual finds within the confines of his home would be severely eroded were the police given authority to barge in upon him without even first announcing their identity and purpose. The shock and fright caused by such an intrusion are manifestly inconsistent with the principles of the Fourth Amendment. As Mr. Justice Brennan indicated in his dissenting opinion in *Ker* v. *California,* 374 U.S. 23, 57 (1963):

> "[C]ases of mistaken identity are surely not novel in the investigation of crime. The possibility is very real that the police may be misinformed as to the name or address of a suspect, or as to other material information. That possibility is itself a good reason for holding a tight rein against . . . unannounced police entries into private homes. Innocent citizens should not suffer the shock, fright or embarrassment attendant upon an unannounced police intrusion."

Since one of the underpinnings for the announcement requirement of Section 3109 is the fundamental right to privacy, there simply is no justification for a rule which would make the requirement applicable to locked doors and inapplicable to closed but unlocked doors. By the very act of closing his door—whether or not he locks it—the occupant of a dwelling has signified his intention to enjoy the privacy of his home and to admit only those persons who are invited.

(2) *Presumption of innocence*—The requirement that federal officers pause to knock at doors and announce their identity and purpose is also designed to insure police conduct consonant with the presumption of innocence which inheres in our system of justice. If that presumption is to be given vitality—and not replaced "lightly" by a presumption of guilt, *United States* v. *Di Re*, 332 U.S. 581, 593-95 (1948)—then, it must be assumed, absent specific facts leading to a contrary conclusion, that the occupant of a dwelling will respond to the officers' announcement and admit them into his house upon a proper description of their authority and purpose. See *Ker* v. *California*, 374 U.S. 23, 56 (1963) (dissenting opinion); *Ratcliffe* v. *Burton*, 3 Bos. & Pul. 223, 230; 127 Eng. Rep. 123, 127 (1802).

Certainly, there is no appropriate ground for bestowing a stronger presumption of innocence on one who locks his closed door than on the unfortunate person who lacks sufficient foresight to turn his latch key or to secure his door bolt. See *Keiningham* v. *United States*, 287 F.2d 126, 130 (D.C. Cir. 1960). Nor is there any conceivable reason to believe that the individual who lives behind locked doors is more likely to respond to the policeman's request for admission than the occupant who has left his door unlocked.

(3) *Avoidance of unnecessary violence*—Twenty years ago, Mr. Justice Jackson noted that "many homeowners in this crime-beset city doubtless are armed." *McDonald* v. *United States*, 335 U.S. 451, 460 (1948) (concurring opinion). What was true then of the District of Columbia is at least equally true today of many of our large urban centers. See *Report of the National Advisory Commission on Civil Disorders*, 523 (1968). The announcement requirement of Section 3109 represents an effort to minimize the violence which will inevitably accompany unannounced intrusions into private dwellings. When closed doors or windows are opened by uninvited and unannounced persons, the possibilities for unnecessary violence are greatly increased. As Mr. Justice Jackson stated, in disapproving surreptitious intrusions by law enforcement officers:

> "I have no reluctance in condemning . . . a method of law enforcement so reckless and so fraught with danger and discredit to the law enforcement agencies themselves."
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> "When a woman sees a strange man in plain clothes, prying up her bedroom window and climbing in, her natural impulse would be to shoot." *McDonald* v. *United States*, 335 U.S. 451, 460-61 (1948).

Insofar as Section 3109 seeks to protect police officers and to reduce the chances of violence attendant upon unannounced intrusions into private dwellings, no logical basis exists for excluding entry through a closed but unlocked door from its coverage. The individual who is enjoying the privacy of his home behind an unlocked door is just as likely to shoot at the unannounced officer who walks through the door as is the person who locked his door.

Because Section 3109 embodies objectives which are fundamental to individual liberty, no distinction worthy of judicial recognition should exist between locked and unlocked doors. To the extent that the lower court's decision rests upon the property concept that a breaking requires force and resultant damage to the door or lock,[16] it is clearly inconsistent with the objectives served by the statute and with this Court's recent Fourth Amendment decisions. As the Court stated only last Term:

> "The premise that property interests control the right of the Government to search and seize has been discredited . . . . We have recognized that the principal object of the Fourth Amendment is the protection of privacy rather than property, and have increasingly discarded fictional and procedural barriers rested on property concepts." *Warden* v. *Hayden*, 387 U.S. 294, 304 (1967). See also *Katz* v. *United States*, 389 U.S. 347, 352-53 (1967).

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[16] That this seems to have been a primary basis for the lower court's decision is reflected in its statement that "the word 'break' has been taken far enough from the connotations of force which usually accompany it, and we are not willing to take it any further for the purpose of enlarging a rule of exclusion." (R. 58).

C. The Decisions of This Court and of Lower Federal Courts Support the Proposition That the Term "Break" in Section 3109 Encompasses Entries by Law Enforcement Officers Through Closed but Unlocked Doors.

In *Miller* v. *United States*, 357 U.S. 301 (1958), this Court held that an unlawful breaking was committed when officers forced open a door held partially closed by a chain, without first complying with the announcement requirement of Section 3109. The Court stated that Section 3109 represented an attempt by Congress to codify "a tradition embedded in Anglo-American law," a tradition which bespoke "the reverence of the law for the individual's right of privacy in his house," *id.* at 313. It went on to declare that

> "Every householder, the good and the bad, the guilty and the innocent, is entitled to the protection designed to secure the common interest against unlawful invasion of the house." *Ibid.*

Although this Court has not previously considered whether entry through a closed but unlocked door constitutes a breaking within the meaning of Section 3109, its recognition of the relationship of that statute to "the reverence of the law for the individual's right of privacy in his house" certainly suggests that the announcement requirement of the statute should obtain in such a situation.

The Court has made clear, in another Fourth Amendment context, that it places little significance on the presence or absence of a lock on a closed means of entry. In *Chapman* v. *United States*, 365 U.S. 610 (1961), a landlord consented to a search of his tenant's house by police officers. One of the officers forced open a closed but unlocked win-

dow and entered the house. Once inside, the officer found an unregistered distillery and 1,300 gallons of mash. Based on that discovery, the officer arrested the tenant upon his return to the house. In holding that the officer's search of the house was unlawful and that the evidence seized during the search should have been suppressed, this Court rejected the argument that a landlord has an absolute right to enter his tenant's dwelling with the police to view waste. It did so on the ground that the landlord has such a right only if his entry into the tenant's premises does not involve the "breaking" of windows or doors. The Court concluded that that fundamental precondition had not been met, since the "landlord and the officers forced open a[n unlocked] window to gain entry to the premises." *Id.* at 616.

The distinction between locked and unlocked doors drawn by the court below has not found favor in other federal courts. In *Keiningham* v. *United States,* 287 F.2d 126 (1960), the Circuit Court of Appeals for the District of Columbia found that a police officer's unannounced entry through a closed but unlocked door in a partition separating two houses was an unlawful breaking within the meaning of Section 3109. The court specifically rejected the type of distinction drawn by the Ninth Circuit in the instant case, as follows:

> "We think that a person's right to privacy in his home (and the limitation of authority to a searching police officer) *is governed by something more than the fortuitous circumstance of an unlocked door,* and that the word 'break,' as used in 18 U.S.C. § 3109, means 'enter without permission.' We think that a 'peaceful' entry which does not violate the provisions of § 3109 must be a permissive one, and not merely one which does not

result in a breaking of parts of the house. We hold that the officers 'entered' . . . when they passed through the door in the partition . . . . " *Id.* at 130 (Emphasis supplied).

Similarly, in *Hair* v. *United States,* 289 F.2d 894 (1961), the District of Columbia Circuit Court of Appeals ruled that an unannounced entry could not be tolerated "whether the door to Hair's home was locked, closed but unlocked, or merely left ajar." *Id.* at 897.[17] See also *United States* v. *Poppitt,* 227 F. Supp. 73, 79-80 (D. Del. 1964).

There can be little doubt that the position adopted in these decisions with respect to what constitutes a breaking under Section 3109 is better calculated to achieve the purposes of that statute and to preserve the fundamental rights

[17] The same Court of Appeals has also held that police officers, who persuaded the occupant of an apartment to open his door by posing as Western Union deliverymen, and then forced their way into the apartment without announcing "the true reason" for their presence, committed an illegal entry. *Gatewood* v. *United States,* 209 F.2d 789, 791 (1953). This ruling seems correct, even though the door was initially opened voluntarily by the occupant. See *Wong Sun* v. *United States,* 371 U.S. 471, 482-83 (1963). It fully conforms to the common law and statutory background against which Section 3109 was enacted. See pp. 18-24, *supra.* Section 499 of the New York Penal Code included within its definition of breaking "an entrance . . . by any threat or artifice used for that purpose . . . . " This definition was based upon numerous common law rulings which hold that an entry into a house by trick or ruse with the intent to commit burglary constituted a "constructive breaking." See, *e.g., State* v. *Mordecai,* 68 N.C. 207 (1873); *Johnston* v. *Commonwealth,* 85 Pa. 54 (1877). Moreover, such a ruling fully conforms to the objectives which underlie Section 3109 (see pp. 24-28, *supra*), and is consistent with the Fourth Amendment principle that entry obtained by "stealth" can be as repugnant as entry gained through "force or coercion." *Gouled* v. *United States,* 255 U.S. 298, 305 (1921).

guaranteed by the Fourth Amendment, than is the hypertechnical rule formulated by the court below.[18]

Because the entry of federal officers into petitioner's apartment constituted an unlawful breaking in violation of Section 3109, the officer's subsequent arrest of petitioner was equally unlawful, and the evidence seized during the search which followed that arrest should have been suppressed.[19] *Miller* v. *United States*, 357 U.S. 301, 313-14 (1958). See also *Weeks* v. *United States*, 232 U.S. 383, 398 (1914).

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[18] It would appear that the lower court may itself have been somewhat embarrassed by the highly artificial distinction upon which it saw fit to rest its decision. As the court admitted:

> "Where officers without authority of the tenant secure a pass key from the landlord and enter by means of the key, such is a breaking . . . . We realize that the distinction between using a door knob to turn a latch, and using a key obtained without permission to turn a bolt, may be slight." (R. 58).

[19] The cocaine was introduced into evidence and should have been excluded. In addition, although the balloons and aluminum foil squares found in petitioner's apartment during the search were not offered, one of the officers testified as to their presence in the apartment and as to their incriminating nature. Since these statements may have prejudiced the jury in its evaluation of petitioner's denial that Jones had delivered any narcotics to him, and in his suggestion that the narcotics were planted in his apartment (R. 40-41), they should have been excluded from evidence. See *Wong Sun* v. *United States*, 371 U.S. 471, 485 (1963); *Silverthorne Lumber Co.* v. *United States*, 251 U.S. 385, 392 (1919); *Nardone* v. *United States*, 302 U.S. 379, 382 (1937). The admission of the officer's testimony about these seized items was clearly harmful error. *Chapman* v. *California*, 386 U.S. 18, 22-24 (1967).

II.

The Nighttime Arrest of Petitioner in His Apartment—Executed by Means of an Unannounced, Unconsented to Entry—Was Unlawful Because of the Federal Officers' Failure to Obtain a Warrant of Any Kind; Consequently, the Evidence Seized in the Search Which Followed That Arrest Should Have Been Excluded at Petitioner's Trial.

Regardless of whether the officers' unannounced nighttime entry into petitioner's apartment violated Section 3109, the subsequent arrest should nevertheless be declared unlawful because it was executed under circumstances which do not excuse the officers' failure to obtain a warrant.[20]

The specific question raised by this section of the Brief has never been resolved by the Court. In *Jones* v. *United States,* 357 U.S. 493, 499-500 (1958), the Court acknowledged that

> "[W]hether the forceful nighttime entry into a dwelling to arrest a person reasonably believed within upon

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[20] Although the question of the need for an arrest warrant was not specifically raised by the petition for certiorari, it was encompassed within petitioner's contention at the trial that the arrest was unlawful because it had been executed "without a warrant" (R. 28). Because the warrant question clearly relates to the basic issue raised by the petition—*i.e.*, the lawfulness of the manner in which the arrest was made—it may properly be considered under the provision of Rule 23(1)(c) of this Court's Rules that "the statement of a question presented will be deemed to include every subsidiary question fairly comprised therein." See, *e.g.*, *Mapp* v. *Ohio,* 367 U.S. 643, 646, 673-74 (1961). The warrant question may also be reviewed pursuant to the Court's power to "notice a plain error not presented." Supreme Court Rule 40(1)(d)(2); see *United Brotherhood of Carpenters* v. *United States,* 330 U.S. 395, 412 (1947); *Sibbach* v. *Wilson & Co.,* 312 U.S. 1, 16 (1940); *Brasfield* v. *United States,* 272 U.S. 448, 450 (1926); *Mahler* v. *Eby,* 264 U.S. 32, 45 (1923); *Weems* v. *United States,* 217 U.S. 349, 362 (1910).

> probable cause that he had committed a felony, under circumstances where no reason appears why an arrest warrant could not have been sought, is consistent with the Fourth Amendment",

presents a "grave constitutional question." For the reasons stated below, petitioner suggests that the time has now come to answer the question left open in *Jones,* and urges that it be answered in the negative.

A. This Court Has Consistently Stressed the Importance of Prior Judicial Intervention Before the Police Execute an Arrest or Conduct a Search—Particularly When an Intrusion Into the Home Is Involved.

As this Court has recognized on numerous occasions, the role which the warrant procedure plays in protecting the citizen from unreasonable police conduct cannot be overemphasized. In *Wong Sun* v. *United States,* 371 U.S. 471, 481-82 (1963), the Court said:

> "The arrest warrant procedure serves to insure that the deliberate, impartial judgment of a judicial officer will be interposed between the citizen and the police, to assess the weight and credibility of the information which the complaining officer adduces as probable cause."

In *Giordenello* v. *United States,* 357 U.S. 480, 486 (1958), the importance of the independent role played by the magistrate was restated as follows:

> "The purpose of the complaint, then, is to enable the appropriate magistrate, here a Commissioner, to determine whether the 'probable cause' required to support a warrant exists. The Commissioner must judge

> for himself the persuasiveness of the facts relied on by a complaining officer to show probable cause. He should not accept without question the complainant's mere conclusion that the person whose arrest is sought has committed a crime."

Moreover, the decisions of this Court teach that a special significance attaches to the warrant procedure when an invasion of a private dwelling is involved, because "the home" has always been viewed as a preferred place, *Brinegar* v. *United States,* 338 U.S. 160, 176 (1949); *Davis* v. *United States,* 328 U.S. 582, 592-93 (1946), whose "seal of sanctity" is not to be broken lightly. *Lewis* v. *United States,* 385 U.S. 206, 211, 213 (1966). As the Court said in *Silverman* v. *United States,* 365 U.S. 505, 511 (1961):

> "At the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." See *Camara* v. *Municipal Court,* 387 U.S. 523, 528 (1967); *Wolf* v. *Colorado,* 338 U.S. 25, 27-28 (1949).

Thus, it is not surprising that, time and again, this Court has stressed the paramount need for the police to obtain the authorization of a magistrate before entering a private dwelling. For example, in *Johnson* v. *United States,* 333 U.S. 10, 14 (1948), the Court said:

> "The right of officers to thrust themselves into a home is also a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent."

See also *United States* v. *Ventresca*, 380 U.S. 102, 106-07 (1965); *Aguilar* v. *Texas*, 378 U.S. 108, 110-13 (1964).

Admittedly, exceptions to the requirement that there be judicial intervention prior to an invasion of the home have been recognized. Thus, police officers need not delay to obtain a warrant, "if to do so would gravely endanger their lives or the lives of others." *Warden* v. *Hayden*, 387 U.S. 294, 299 (1967). A warrant may also be dispensed with if the police have substantial reason to believe that crucial evidence is in imminent danger of being destroyed. *Ker* v. *California*, 374 U.S. 23, 41-42 (1963). In addition, some searches of homes without search warrants have been sustained if made incident to lawful arrests supported by arrest warrants. See, *e.g.*, *Rabinowitz* v. *United States*, 339 U.S. 56 (1950); *Harris* v. *United States*, 331 U.S. 145 (1947);[21] but see *Kremen* v. *United States*, 353 U.S. 346 (1957).

This Court has admonished, however, that these exceptions to the warrant procedure "have been jealously and

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[21] It should be noted that in both *Rabinowitz* and *Harris*, arrest warrants had been obtained prior to the entry by the police. Thus, in *Harris* v. *United States*, 331 U.S. 145, 153 (1947), the Court said:

> "This is not a case in which law enforcement officials have invaded a private dwelling without authority and seized evidence of crime. . . . Here the agents entered the apartment under the authority of lawful warrants of arrest."

This point was stressed again by four Justices in their dissenting opinion in *Abel* v. *United States*, 362 U.S. 217, 249 (1959):

> "In *Harris* and *Rabinowitz*, the broad search was performed as an incident to an arrest for crime under warrants lawfully issued. . . . The issuance of these warrants [of arrest] is by no means automatic—it is controlled by a constitutionally prescribed standard. It thus could be held that sufficient protection was given the individual without the execution of a second warrant for the search."

See also *Wong Sun* v. *United States*, 371 U.S. 471, 480, n. 8 (1963).

carefully drawn." *Jones* v. *United States*, 357 U.S. 493, 499 (1958). Consistent with that admonition, there is no basis for excusing the officers' failure to obtain a warrant of any kind under the circumstances of this case.

B. The Fourth Amendment Requires That Officers Who Execute a Nighttime Arrest in a Private Dwelling Must Obtain an Arrest Warrant in the Absence of Emergency Circumstances Which Would Require Immediate Action.

The facts of this case relating to the conduct of the arresting officers are not in dispute. The informant whose statements constituted the principal basis for the arrest was within the agents' custody for a full day. The telephone conversation between Jones and "Johnny"—upon which the court below also supported its assertion of probable cause—occurred approximately five hours prior to the arrest. The alleged delivery of the narcotics to petitioner could have been made at almost any time the officers chose to take Jones to petitioner's apartment. In short, the officers were in virtually complete control of the situation. They had ample time to obtain the independent determination of a magistrate as to whether their contemplated arrest of petitioner in his home was lawful, but they failed to do so.[22] Instead, they proceeded to petitioner's home at

[22] Had the officers gone to a magistrate before proceeding to petitioner's apartment house, it is entirely possible that the magistrate would have found an absence of probable cause. Indeed, it is unlikely that the officers had probable cause to make an arrest at the time they brought Jones to the building in which petitioner's apartment was located. Their original information concerning the involvement of a second person in the transporting of cocaine had come from an unreliable informant who was himself arrested while importing narcotics in violation of the law. Compare *Aguilar* v. *Texas*, 378 U.S. 108 (1964); *Draper* v. *United States*, 358 U.S. 307 (1959). Their primary corroborative evidence of Jones' information was obtained from a telephone call which Jones made to a number

night, forced their way, unannounced, into his apartment, arrested him, and then conducted a general search of the

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answered by a man named "Johnny." The conversation between the two men was ambiguous, and the agents performed no independent investigative work to verify whatever information they obtained from it or from Jones. See *Wong Sun* v. *United States*, 371 U.S. 471, 481 (1963); *Gilbert* v. *United States*, 366 F.2d 923 (9th Cir.), *cert. denied*, 388 U.S. 922 (1967); *United States* v. *Irby*, 304 F.2d 280 (4th Cir.), *cert. denied*, 371 U.S. 830 (1962); *Rodgers* v. *United States*, 267 F.2d 79 (9th Cir. 1959).

However, any fear which the agents had that they might not have persuaded a magistrate to issue a warrant does not excuse their failure to apply for one. If anything, it underscores the importance of the need for a judicial check on their action and for supplemental independent investigation to corroborate their suspicion. For example, they could have checked the police files to determine whether Jones had a prior narcotics record or had previously furnished reliable information to the police. They also could have traced the telephone number which Jones called to ascertain the name under which it was listed and whether it was located at the house in which Jones said his accomplice lived.

Despite their complete control of the situation, they chose to do none of these things, but, instead, proceeded directly to petitioner's apartment, and outfitted Jones with an electronic bug—the unauthorized use of which is not beyond challenge. See *Osborn* v. *United States*, 385 U.S. 323 (1960); compare *Lopez* v. *United States*, 373 U.S. 427 (1963). Since the information which they obtained by use of that device added little to their prior knowledge, it is equally unlikely that the officers had probable cause at the time they entered the apartment with their guns drawn. In view of their unwillingness to conduct any independent investigation before sending Jones into the apartment, the agents probably could have been reasonably certain that probable cause existed only after Jones emerged either without the narcotics or with the promised $100. At that time, one of the agents should have applied for a warrant—while the others stood guard at the apartment to insure against petitioner's escape or the disposal of the cocaine—unless extraordinary circumstances existed which would have required immediate action. See *Johnson* v. *United States*, 333 U.S. 10, 15 (1948).

What clearly emerges, however, is that, because of the closeness of the probable cause question at the various relevant times involved in this case, a magistrate—and not the officers—should have decided whether and when a reasonable basis existed for petitioner's arrest. Instead of taking all steps reasonable under the circumstances to obtain authority for their invasion of petitioner's home, the agents acted recklessly and in complete defiance of the warrant procedure.

apartment. In the absence of circumstances requiring such precipitous action—of which there are none in this case—such conduct on the part of the police should not be tolerated.

There are several persuasive reasons why the Court should now decide the question left open in *Jones* v. *United States,* 357 U.S. 493, 499-500 (1958), and hold that the conduct of the federal officers in this case was unlawful due to their failure to obtain a warrant.

(1) In view of the fact that "the Fourth Amendment's commands . . . are practical and not abstract", *United States* v. *Ventresca,* 380 U.S. 102, 108 (1965), some of the Court's recent decisions appear to have sanctioned carefully circumscribed, but nevertheless, somewhat relaxed standards for determining whether probable cause exists to support an arrest. Thus, a reliable informant's statement that a person was peddling narcotics was found sufficient to constitute probable cause when corroborated merely by the facts that the informant's description of the defendant's appearance and of his whereabouts on a given morning were later borne out. *Draper* v. *United States,* 358 U.S. 307, 313 (1959). Under appropriate circumstances, hearsay alone may be sufficient to justify the issuance of a warrant, provided there is a "substantial basis for crediting the hearsay", *Jones* v. *United States,* 362 U.S. 257, 272 (1960)—such as a sufficient description of the "underlying circumstances" of the informant's reliability and his accusatory statements to enable a magistrate to make a balanced judgment. *Aguilar* v. *Texas,* 378 U.S. 108, 114-15 (1964). In addition, only last Term, the Court declared that, under appropriate circumstances, police officers making warrantless arrests based on credible information from

reliable informants need not identify those informants, despite a challenge to the probable cause basis for the officers' action. *McCray* v. *Illinois,* 386 U.S. 300 (1967).

As a corollary to the wider latitude accorded the police in establishing the existence of probable cause, it is imperative that the Court require a more consistent adherence to the warrant procedure. If, for example, an officer may justify an arrest on the basis of the credible hearsay statements of a secret, reliable informant, then surely it is not unreasonable to insist that, when the circumstances permit it, the existence of probable cause "be decided by a judicial officer" and "not by a policeman or Government enforcement agent." *Johnson* v. *United States,* 333 U.S. 10, 14 (1948). Such a requirement would be consistent with "the preference accorded police action taken under a warrant." *United States* v. *Ventresca,* 380 U.S. 102, 107 (1965). See *Aguilar* v. *Texas,* 378 U.S. 108, 110-11 (1964); *United States* v. *Lefkowitz,* 285 U.S. 452, 464 (1931).

Any requirement short of this would too easily facilitate a *post-facto* justification for the arrest on the basis of evidence obtained through the warrantless arrest and the usual, incidental search. As the Court noted in *Beck* v. *Ohio,* 379 U.S. 89, 96 (1964):

> "An arrest without a warrant bypasses the safeguards provided by an objective predetermination of probable cause, and substitutes instead the far less reliable procedure of *an after-the-event justification for the arrest or search, too likely to be subtly influenced by the familiar shortcomings of hindsight judgment.*" (Emphasis supplied.)

In short, if a viable judicial check is to be placed on the growing practice of using the hearsay statements of in-

formants as the basis for arrests, greater emphasis must be placed on the fundamental safeguards of the warrant procedure.[23] See Comment, 53 Calif. L.Rev. 840, 856-58 (1965). As a first, but significant, step in that direction, the police should certainly be required to obtain an arrest warrant under the circumstances presented by this case.

(2) The Fourth Amendment cases considered by this Court clearly indicate that arrests executed in private dwellings almost inevitably lead to a general search of the premises. See, *e.g.*, *Ker* v. *California*, 374 U.S. 23 (1963); *Rabinowitz* v. *United States*, 339 U.S. 56 (1950); *Harris* v. *United States*, 331 U.S. 145 (1947). In some cases, the police may even time the arrest so that it can take place in a home, the search of which can thereafter be justified as incident to the arrest. See *McKnight* v. *United States*, 183 F.2d 977 (D.C. Cir. 1950). Indeed, the circumstances surrounding petitioner's arrest suggest that the agents in this case were at least as interested in rummaging through his apartment in search of narcotics as they were in simply arresting him for a crime which they believed he had committed.

In view of the broad incidental search and seizure powers conferred on arresting officers—which, under limited circumstances, includes even the power to seize "mere evidence," *Warden* v. *Hayden*, 387 U.S. 294 (1967)—there can

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[23] As has been noted, a mandate from this Court seems necessary if the police are to be persuaded that they should seek arrest warrants if the circumstances permit. See, *e.g.*, Broeder, *Wong Sun* v. *United States, A Study in Faith and Hope*, 42 Neb. L. Rev. 483, 493 (1963). For example, a random survey of 770 arrests in Philadelphia in 1952, disclosed that only 24, or about 3%, were executed pursuant to warrants. Note, *Philadelphia Police Practice and the Law of Arrest*, 100 U. Pa. L. Rev. 1182, 1183 (1952).

be no justification, in the absence of extraordinary facts, for their failure to obtain an arrest warrant, particularly when the arrest is to be executed at night in a private dwelling. Indeed, the Court in *Hayden* seemed to imply that the warrant procedure should be a necessary prerequisite to an officer's right to conduct incidental searches of living premises in view of the broadened scope of such searches authorized by the decision in that case. The Court said:

> "Privacy is disturbed no more by a search directed to a purely evidentiary object than it is by a search directed to an instrumentality, fruit, or contraband. *A magistrate can intervene in both situations, and the requirements of probable cause and specificity can be preserved intact.*"
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>
> "[I]f its rejection [the mere evidence limitation] does enlarge the area of permissible searches, *the intrusions are nevertheless made after fulfilling the probable cause and particularity requirement of the Fourth Amendment and after the intervention of 'a neutral and detached magistrate.'*" *Id.* at 301-02, 309-10 (Emphasis supplied).

(3) A stringent warrant requirement would serve the legitimate interests of law enforcement as much as the guarantees of individual freedom embodied in the Fourth Amendment. Recourse to the magistrate would provide the police with an informed, independent judgment as to whether probable cause then existed to justify an arrest, or whether additional investigation should be undertaken before a lawful arrest could be executed. Moreover, the magistrate could assist the officer in establishing a proper

record. For example, the contemporaneous, probing questions of the magistrate might reveal facts supporting the existence of probable cause which the police officer might not have considered relevant, or which he might have forgotten by the time a subsequent hearing on a motion to suppress evidence could be held.

Although the magistrate's judgment is not binding, this Court has nevertheless acknowledged that "the reviewing court will pay substantial deference to judicial determinations of probable cause." *Aguilar* v. *Texas,* 378 U.S. 108, 111 (1964). It has also indicated that, since it strongly supports

> "searches under a warrant, . . . in a doubtful or marginal case a search under a warrant may be sustainable where without one it would fall." *United States* v. *Ventresca,* 380 U.S. 102, 106 (1965).

In *Ventresca,* the compatibility between the warrant procedure and the legitimate interests of law enforcement was specifically recognized, as follows:

> "This Court is equally concerned to uphold the actions of law enforcement officers consistently following the proper constitutional course. This is no less important to the administration of justice than the invalidation of convictions because of disregard of individual rights or official overreaching." *Id.* at 111-12.

Over thirty-five years ago, this Court announced that "the informed and deliberate determinations of magistrates empowered to issue warrants . . . are to be preferred over the hurried action of officers . . . who may happen to make arrests." *United States* v. *Lefkowitz,* 285 U.S. 452, 464 (1931). The reason for this preference was described by

the Court in *Johnson* v. *United States*, 333 U.S. 10, 13-14 (1948), as follows:

> "The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime."

See also *Katz* v. *United States*, 389 U.S. 347, 354-56 (1967).

Petitioner urges the Court to reenforce its preference for the warrant procedure by requiring, at the very least, that, in the absence of circumstances necessitating immediate action, police officers must obtain an arrest warrant before they may execute a nighttime arrest in a private dwelling.[24] See *Gatlin* v. *United States*, 326 F.2d 666, 671, n. 10 (D.C. Cir. 1963). Because the federal agents failed to obtain such a warrant in this case, and because the Record reflects a complete absence of any circumstances which would excuse

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[24] The importance of such a requirement was recognized by the Court of Appeals for the District of Columbia, as follows:

> "Unless the necessities of the moment require that the officer break down a door, he cannot do so without a warrant; and if in reasonable contemplation there is opportunity to get a warrant, or the arrest could as well be made by some other method, the outer door to a dwelling cannot be broken to make an arrest without a warrant. The right to break open a door to make an arrest requires something more than the mere right to arrest. If nothing additional were required, a man's right of privacy in his home would be no more than his rights on the street; and the right to arrest without a warrant would be precisely the same as the right to arrest with a warrant. The law is otherwise." *Accarino* v. *United States*, 179 F.2d 456, 464 (1949).

their failure to do so, petitioner's arrest was unlawful, and the evidence seized in his apartment should have been suppressed.[25]

Conclusion

For the reasons stated, the judgment of the Court of Appeals should be reversed, and petitioner's conviction should be set aside.

Respectfully submitted,

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March 1968

[25] See footnote 19, *supra*, p. 32.

SUPREME COURT, U. S.

APR 17 1968

JOHN F. DAVIS, CLERK

No. 898

In the Supreme Court of the United States

OCTOBER TERM, 1967

JOHNNY SABBATH, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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CITATIONS

297-045—68——1

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BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (R. 54–58) is reported at 380 F. 2d 108.

JURISDICTION

The judgment of the court of appeals was entered on June 27, 1967 (R. 59). The petition for a writ of certiorari was filed on August 25, 1967, and was granted on December 11, 1967 (R. 61). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner's arrest is rendered invalid by reason of the agents' failure to comply with the an-

nouncement rule of 18 U.S.C. 3109 prior to opening the closed but unlocked door of petitioner's apartment.

2. Whether petitioner's arrest and the incidental search which followed were invalid because the agents failed to seek a warrant, although they allegedly had time to do so.[1]

STATUTE INVOLVED

18 U.S.C. 3109 provides as follows:

> The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant.

26 U.S.C. 7607 provides in pertinent part:

> The Commissioner, Deputy Commissioner, Assistant to the Commissioner, and agents, of the Bureau of Narcotics of the Department of the Treasury, and officers of the customs (as defined in section 401 (*i*), of the Tariff Act of 1930, as amended; 19 U.S.C., sec. 1401(*i*)), may—
>
> * * * * *
>
> (2) make arrests without warrant for violations of any law of the United States relating to narcotic drugs (as defined in section 4731) or marihuana (as defined in section 4761) where the violation is committed in the presence of the person making the arrest or where such person has reasonable grounds to believe that the person to be arrested has committed or is committing such violation.

[1] This question is argued in petitioner's brief but was not raised in his petition.

STATEMENT

Petitioner was convicted by a jury in the United States District Court for the Southern District of California of knowingly importing cocaine and concealing and facilitating the transportation and concealment thereof, in violation of 21 U.S.C. 173 and 174. He was sentenced to concurrent terms of imprisonment for ten years (R. 2–3, 50–52). The court of appeals affirmed (R. 54–58).

On February 19, 1966, William Jones, who was returning to Los Angeles from a visit to Tijuana which he had made in the company of petitioner, was detained at the border by customs agents, who found an ounce of cocaine in his possession. Jones was also carrying a card on which was written the name "Johnny" and a Los Angeles telephone number (R. 6–8, 24, 31, 43). On the following day, at about 3:00 p.m., Jones made a call to this number while a customs agent, with Jones' permission, listened in. The agent dialed the number and a male voice responded on the telephone. Jones addressed this man as "Johnny", and referred to himself as "B. J." Jones said he was still in San Diego and still "had his thing." The other man asked Jones if he had any trouble getting through the line, and Jones said he did not. The other man said that he had had some trouble and that he would tell Jones about it when he saw him. Jones said that he was on his way up (R. 8, 42–44).

At about 7:30 that evening, the customs agents placed a small broadcasting device on Jones, returned

the package of cocaine, and accompanied him to an apartment building in Los Angeles. They listened through a receiving apparatus while Jones knocked on the door and a woman answered. Jones asked if Johnny was in and was told to wait a minute. Steps were heard and then a man asked Jones if he had any trouble getting through the line, to which Jones responded negatively. Although reception was poor because of the volume of a phonograph player inside the apartment, the agents were able to hear a discussion about a "package" (R. 19–22).[2]

The agents waited five to ten minutes before they decided to arrest petitioner. During most of this time they were uncertain as to what was taking place in the apartment because of the continued noise from the phonograph. One of the agents knocked on the door, waited a few seconds, and, receiving no response, opened the unlocked door and entered the apartment. At least one of the agents had his gun drawn. They saw petitioner seated on a couch, in the process of withdrawing his hand from under the cushion on which he was seated. After placing petitioner under arrest, one of the agents looked under the cushion and found the package of cocaine which they had returned to Jones before he entered the apartment (R. 23–24, 26–27, 39, 45–46). A search of the apartment revealed approximately $500 in cash and a quan-

[2] Jones corroborated this account, giving more details. He said that he was very nervous, because he had never been in this kind of a situation before (R. 10–18). He forgot to ask petitioner for his hundred dollars (R. 13).

tity of materials adapted to packaging cocaine (R. 27, 47–48).

No pre-trial motion to suppress was made. The only objection to the admission of the seized cocaine into evidence was based on the ground that the agents did not have sufficient probable cause to arrest petitioner without a warrant.[3] The court denied the motion to exclude the evidence (R. 28–29). Petitioner urged for the first time on appeal that the manner of entry was improper, and the court of appeals considered and overruled this contention. At no time prior to the filing of his brief in this Court did he urge that the narcotics should have been suppressed because there was time to obtain a search warrant.

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[3] Out of the hearing of the jury, the following objection was made (R. 28):

Mr. BRADLEY: Now, your Honor, in view of this officer's testimony, in view of this agent's testimony that he went to this apartment without a warrant, with the intention of arresting the occupants, and the only information that he is relying upon was the information given to him by Jones, and he, Jones, he had never seen before in his life, there is no evidence to establish whatsoever that Jones is a reliable informant, sufficient to justify this officer's breaking into somebody's apartment without a warrant—

The COURT: No, but what he heard over the radio transmitter confirmed what was told him.

Mr. BRADLEY: Well, that is pure speculation that it confirms anything because all he testified to—

The COURT: Well, I know, but isn't that sufficient?

Mr. BRADLEY: Not pure speculation; he must have reasonable cause.

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SUMMARY OF ARGUMENT

I

Since petitioner did not claim at trial that there had been an illegal entry, the record does not clearly establish that the agents failed to announce their purpose before they entered his apartment by opening a closed but unlocked door.

Even if it is assumed, however, that no announcement was made, the entry did not violate the applicable standards set forth in 18 U.S.C. 3109, which codifies the common law "rule of announcement." Section 3109 does not prohibit all unannounced entries into private residences. The statute is violated only where the officers "break open" a door without first announcing their purpose and being refused admission by the owner. Since the function of Section 3109 is to instruct law enforcement officers with respect to their authority, the words of the statute should be interpreted in accordance with their ordinary and generally accepted meaning. In common understanding, "break open" connotes the forcible destruction of a locked door; it does not include an entry by turning the knob of an unlocked door.

In order to bring the type of entry involved in this case within the announcement rule, petitioner urges, in effect, that Section 3109 be read as if it did not include the word "break." This interpretation is inconsistent with the common law antecedents of the rule of announcement. The English cases which gave first expression to the rule and which charted its subsequent development show that an announcement

was required only where entry was to be made by forcing open a locked door. Its purpose was to avoid destruction and the provocation of violence. Where the officers found the door open, or where entering would not involve the destruction of a lock, an announcement was not required. It is immaterial, moreover, that entry through a closed but unlocked door constitutes a burglary in some jurisdictions. There is no evidence that Congress intended that Section 3109 should be interpreted as if it were a prohibition against burglary, and there is no logical justification for determining the lawfulness of the conduct of a police officer, who has a right to enter the premises against the owner's wishes, by reference to laws which prohibit entry by a person who intends to commit a felony.

To the extent that the rule of announcement is related to considerations of privacy, we submit that the conduct of the officers in the present case fully satisfies the Fourth Amendment's standard of reasonableness. Considerations of privacy do not compel an extension of the announcement requirement to an entry through an unlocked door. Contrary to petitioner's assertion, the rule of announcement does not establish standards for non-permissive entries; an officer armed with a warrant or acting under probable cause has the right to enter without the owner's permission in all events. The essential interest in privacy to be protected by the rule of announcement is to avoid the shock of a sudden and forcible intrusion. The established common law distinction between forcible and

non-forcible entries is adequate to satisfy this interest.

Even if the rule of announcement should be held to apply to an entry through an unlocked door, the agents' alleged failure to make an announcement was justified by the exigent circumstances of the present case. The agents had placed an untried informer in a dangerous situation which left little margin for error.

II

The additional question which petitioner now raises for the first time—that the arrest was invalid because the agents failed to obtain a warrant although they allegedly had time to do so—is not within the grant of certiorari. In all events, the failure to obtain a warrant did not invalidate the arrest. Even if the agents lacked probable cause for petitioner's arrest at the time he contends they should have sought a warrant, the denial of a warrant would not have prevented them from continuing their investigation, as they in fact did. Probable cause was clearly established when the agents overheard petitioner's conversation with the informer in petitioner's apartment, and at that point it was not practicable to seek a warrant or to delay the arrest.

ARGUMENT

I. PETITIONER'S ARREST BY FEDERAL AGENTS WHO ENTERED HIS APARTMENT BY OPENING AN UNLOCKED DOOR WAS LAWFUL UNDER THE "RULE OF ANNOUNCEMENT" CODIFIED IN 18 U.S.C. 3109

The principal issue of law in this case is presented by petitioner on the assumption that the agent did not announce his purpose prior to entering petitioner's

apartment. The only support for this assumption is the inference which petitioner draws from the fact that the agent did not affirmatively testify that he had made an announcement. However, in view of petitioner's failure to object at trial to the manner of entry, there was no occasion to explore in detail the circumstances which prompted the officers to enter when and as they did. Although we discuss the merits of the issue on the assumption of fact made by petitioner and the court below, we adhere to the views expressed in our brief in opposition to the petition that this issue is not properly presented by the record. See *Giordenello* v. *United States*, 357 U.S. 480, 488.

A. ENTRY BY MEANS OF OPENING A CLOSED BUT UNLOCKED DOOR IS NOT A BREAKING OPEN OF THE DOOR WITHIN THE MEANING OF 18 U.S.C. 3109

We agree with the court below (R. 56–57) and the petitioner (Br. 17–18 & nn. 11–12) that the legality of arrests by federal officers for federal offenses should be determined by reference to federal law, and that the appropriate source of federal law on the issue presented by this case is 18 U.S.C. 3109. Although Section 3109, by its terms, applies only to the execution of search warrants, it embodies established standards of conduct governing entry into private homes which would seem to be equally applicable to situations involving entry for the purpose of making an arrest.

1. Used in their ordinary and generally accepted sense, the words "break open" in Section 3109 do not mean an entry by turning the knob of an unlocked

door. The first reference in matters of statutory construction is to the literal meaning of the words employed. *Flora* v. *United States*, 357 U.S. 63, 65. The words are to be taken in their ordinary sense and according to the common understanding. *Rathbun* v. *United States*, 355 U.S. 107, 109; *Crane* v. *Commissioner of Internal Revenue*, 331 U.S. 1, 6. These precepts are especially apposite here since the statute is an instruction to federal officers regarding their authority to use force. The situations in which an officer must consider the scope of that authority are likely to require immediate response, without time to consider alternatives beyond the ordinary connotation of the words. It is scarcely the common understanding that turning the knob of an unlocked door is a breaking open of the door. To reach the result which petitioner urges would require that the statute be read as if it did not include the word "break."

Also, of course, all portions of the statute must be considered in ascertaining its meaning. *National Labor Relations Board* v. *Lion Oil Co.*, 352 U.S. 282, 288. Section 3109 says that officers may not only break open outer doors; they may break open inner doors, any part of the house, or anything therein. If "break-open" means no more than open, as petitioner contends, these provisions are oddly superfluous. Surely officers armed with a search warrant would be entitled to turn the knobs on any inner doors, and open chests, drawers, boxes, and closets. Otherwise their right to search would be meaningless. With regard to the phrase, "when necessary to liberate himself", would an officer need specific authority to turn a doorknob to go out? Only by giving the words "break open" their natural meaning are these provisions comprehensible.

With the exception of the District of Columbia Circuit cases on which petitioner relies (Br. 30–31), the courts of appeals have held that "breaking", as used in Section 3109, means forcible entry. *United States* v. *Conti*, 361 F. 2d 153, 157 (C.A. 2); *United States* v. *Monticallos*, 349 F. 2d 80, 82 (C.A. 2); *United States* v. *Garnes*, 258 F. 2d 530, 533 (C.A. 2), certiorari denied, 359 U.S. 937; *United States* v. *Hassell*, 336 F. 2d 684 (C.A. 6), certiorari denied, 380 U.S. 965; *United States* v. *Williams*, 351 F. 2d 475, 477 (C.A. 6).[4]

2. The common law antecedents of Section 3109 show that the "breaking open"—which the statute implicitly forbids in the absence of prior announcement of authority and purpose—referred, from its earliest expression, to the common understanding of a violent forcing of locked doors. *Semayne's Case*, 5 Co. Rep. 91a, 11 E. R.C. 629, 77 Eng. Rep. 194 (1603), involved the execution of a civil writ of attachment for goods on private premises, but the Court of King's Bench went beyond the immediate question to resolve related issues, including the authority of the sheriff forcibly to enter a private house in order to

[4] The prior decisions in the Ninth Circuit are also in accord with the decision below. See *Ng Pui Yu* v. *United States*, 352 F. 2d 626, 632; *Hopper* v. *United States*, 267 F. 2d 904, 908; *Williams* v. *United States*, 273 F. 2d 781, 792–793, certiorari denied, 362 U.S. 951. Although an entry by opening a locked door with a passkey obtained without the owner's consent, as in *Munoz* v. *United States*, 325 F. 2d 23, presents a more difficult problem, this type of entry could be held to be a "breaking," consistently with the interpretation urged in the text, because the unauthorized use of the passkey defeats the owner's attempt to seal his door. See pp. 19–21, *infra*.

execute a writ issued at the government's instance (77 Eng. Rep. at 195–196):

> In all cases when the King is party, the sheriff (if the doors be not open) may break the party's house, either to arrest him, or to do other execution of the K.'s process, if otherwise he cannot enter. But before he breaks it, he ought to signify the cause of his coming, and to make request to open doors; * * * for the law without a default in the owner abhors the destruction or breaking of any house (which is for the habitation and safety of man) by which great damage and inconvenience might ensue to the party * * *.

It is clear from subsequent statements in the opinion that the rule of announcement was limited to an entry by forcing open a locked door; the court went on to say that an officer "may open the doors which are shut, and *break them, if he cannot have the keys;* which proves, that he ought first to demand [the keys] * * *" (*id.* at 196, emphasis added). And in discussing the arrest of an accused under indictment for trespass, the court again distinguished between opening a closed door and breaking a locked door (*ibid.*):

> (T)he sheriff may break his house to arrest him; but in such case, if he breaks the house when he may enter without breaking it (that is, on request made, or if he may open the door without breaking), he is a trespasser.

As the first quotation from *Semayne's Case* indicates, the purpose of the rule of announcement was to avoid needless "destruction or breaking" of a

house by giving the owner an opportunity to acquiesce in the sheriff's mission. In an age when the protection of person and property from outlaws was initially, and often solely, the responsibility of each individual, the rule primarily reflected a concern for preserving an individual's defenses against intruders, except where he willfully imposed them against the King's process. To the extent that notions of an individual's right to privacy in his home underlay the rule, it is evident that these values were subordinate, for the court indicated that if the sheriff found the door open, he could enter without announcement, even for the purpose of executing a civil writ on behalf of a private party (*id.* at 197). Although we know of no English case in which the court dealt specifically with the question whether an officer exceeds his authority by making an unannounced entry through a closed but unlocked door, we find nothing which would support the theory that such an entry would be held unlawful. Indeed, by emphasizing that the purpose of the rule was to avoid unnecessary violent entries, subsequent cases and commentary suggest that the requirement of announcement would be confined to instances where an officer forced open a locked door.[15] This view is confirmed by the comparatively modern case of *Ryan* v. *Shilcock,* 7 Ex. 71, 155 Eng. Rep. 861 (1851), in which the court held that a landlord's entry into his tenant's premises by removing a staple used to keep the door closed was not unlawful. Pollock C.B. stated the

[15] See, *e.g.*, *Lloyd* v. *Sandilands*, 8 Taunt. 250, 129 Eng. Rep. 379 (1879); 1 East, *Pleas of the Crown* 323 (1803).

question and its resolution as follows (155 Eng. Rep. at 862):

> [W]hether a landlord, who on coming to his tenant's premises for the purpose of distraining finds the outer door closed, but capable of being opened by lifting a latch, is justified in so doing. We are of opinion that the landlord has authority by law to open the door in the ordinary way in which other persons can do it, when it is left so as to be accessible to all who have occasion to go into the premises.

3. Contrary to petitioner's contention (Br. 20–24), there is no evidence that Congress intended to incorporate the common law definition of burglary as the substance of the words "break open" in 18 U.S.C. 3109. Section 3109 has no helpful legislative history. It was derived from certain provisions of the Espionage Act of 1917,[5] which in turn were "based on the New York law on this subject" (H. Rep. No. 69, 65th Cong., 1st Sess., p. 20). Seizing upon this comment, petitioner argues that entry by opening an unlocked door is a breaking under Section 3109, because such an entry constituted a burglary under New York law and because the New York Supreme Court had indicated in an 1841 decision that "what would be a breaking of the outer door in burglary, is equally a breaking by the sheriff" (*Curtis* v. *Hubbard,* 1 Hill 336, 338, affirmed, 4 Hill 437). This is quite unpersuasive. The "New York law" which Congress borrowed in 1917 is found in Sections 799 and 800 of the New York Code of Criminal

[5] Espionage Act of 1917, Title XI, Sections 8 and 9, 40 Stat. 229.

Procedure of 1881.[6] These provisions—which are virtually identical to the comparable sections of the Espionage Act, and which are the source of the language in 18 U.S.C. 3109—merely restate the common law rule of announcement and two of its traditional exceptions. The reasonable inference to be drawn from the enactment of the federal legislation is that Congress intended to adopt the basic principles of the rule of announcement rather than the particular law of one jurisdiction. Moreover, there is no indication that Congress, in 1917, considered or was even aware of *Curtis* v. *Hubbard*. It cannot fairly be said that Congress intended to incorporate a statement from that obscure decision in the federal statute. *Yates* v. *United States*, 354 U.S. 298, 309–310.

Moreover, as authority for the proposition that the lawfulness of a policeman's entry to make an arrest is to be determined by reference to the law of burglary, *Curtis* v. *Hubbard* does not bear the weight which petitioner assigns to it. The issue in the case involved the execution of a civil process, and the full opinion makes clear that the statement on which petitioner relies is to be limited to those facts. Viewed

[6] § 799. The officer may break open an outer or inner door or window of a building, or any part of the building, or any thing therein, to execute the warrant, if, after notice of his authority and purpose, he be refused admittance.

§ 800. He may break open any outer or inner door or window of a building, for the purpose of liberating a person, who, having entered to aid him in the execution of the warrant, is detained therein, or when necessary for his own liberation.

in that context, the statement is in accord with the rule which had been established prior to *Semayne's Case* that a sheriff's right to enter a house to execute a civil writ is much more limited than his right to enter when armed with a criminal process. See Y.B. 13 Edw. IV, fol. 9, translated in *Burdett* v. *Abbot,* 14 East 1, 117, 104 Eng. Rep. 501, 546. In *Semayne's Case,* the court held that the right to make a forcible entry did not extend to the execution of a civil process (77 Eng. Rep. at 198). And this rule has been reaffirmed in subsequent English and American cases.[7] To whatever extent the burglary analogy may have application in a case involving the execution of a civil process, petitioner cites no authority which would support an extension of that doctrine to the present case.[8]

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[7] See Blakey, *The Rule of Announcement and Unlawful Entry—Miller v. United States and Ker v. California*, 112 U. Pa. L. Rev. 499, 501–502, 504–505 (1964).

[8] Petitioner cites (Br. 21) a passage in Voorhees, *Law of Arrest* § 172 (1904) which purports to extend the burglary analogy, but the only authority which the textwriter cites is *Curtis* v. *Hubbard*, *supra*—a decision which involved only the execution of a civil process. Petitioner also relies (Br. 23) on the following quotation from Wilgus, *Arrest Without a Warrant* (Pt. 2), 22 Mich. L. Rev. 798, 806 (1924):

"What constitutes 'breaking' *seems to be* the same as in burglary: lifting a latch, turning a door knob, unlocking a chain or hasp, removing a prop to, or pushing open, a closed door of entrance to the house—even a closed screen door * * *." (Emphasis added.)

In support of this rather qualified assertion, Professor Wilgus cites a note in 61 American Decisions, Voorhees' *Law of Arrest*, *supra*, §§ 183–190, and some twenty-two American and English decisions. The cases, however, do not support the text.

Apart from the lack of legislative history or common law precedent to support petitioner's argument, we see no logic or practical justification for defining the scope of an officer's right to make an unannounced entry for the purpose of effecting a lawful arrest by the application of rules which proscribe the conduct of a person who enters for the purpose of committing a felony. The societal interests concerned in the application of the rule of announcement and the law of burglary are significantly different. Society has a substantial interest in the success of the officer's attempt to make an arrest; it is deeply opposed to the burglar's achievement of his objective. When the burglary laws are applied, society's interest lies in rules which narrowly limit the types of entries which a person may make without subjecting himself to criminal penalties.[9] But the officer, unlike the felon,

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With the exception of four irrelevant English decisions on execution of civil writs and one American decision on attachment, which has no possible pertinency, they all involve criminal prosecutions in which it was held that there had been a sufficient breaking to constitute burglary or its statutory equivalent. None of the cases made any reference to the right of a sheriff to enter or break doors for the service of process, either civil or criminal. Petitioner also cites a number of decisions from New York and other jurisdictions where burglary convictions were sustained over a defense contention that there was no breaking. None of these cases discussed a sheriff's right to enter, or compared that type of entry to breaking by a felon.

[9] See Note, *A Rationale of the Law of Burglary*, 51 Colum. L. Rev. 1009, 1013–1014 (1951). As one of the "tangle of incongruous distinctions" in the law of burglary, it is noted that "breaking" as a necessary element in all degrees of burglary had been retained in only eighteen jurisdictions.

has the right to enter the premises in order to make an arrest. In the application of the announcement requirement, society's interest favors rules which will not unduly impair the officer's effectiveness. And to the extent that there must be limitations on an officer's right to make an unannounced entry, it is clear that such restrictions have no common purpose with the laws against burglary. Therefore any similarity in the result in the application of these two laws should be purely coincidental, and not the product of a deliberate transfer of rules from one body of law to the other.

B. AN UNANNOUNCED ENTRY IN THE CIRCUMSTANCES OF THIS CASE WAS REASONABLE UNDER FOURTH AMENDMENT STANDARDS AND THEREFORE DID NOT VIOLATE ANY PROTECTION OF THE RIGHT TO PRIVACY GUARANTEED BY SECTION 3109

This Court's decisions in *Ker* v. *California,* 374 U.S. 23, and *Miller* v. *United States,* 357 U.S. 301, lend support to petitioner's argument that the rule of announcement codified in Section 3109 is designed in part to protect the right to privacy guaranteed by the Fourth Amendment. The opinions of Mr. Justice Clark and Mr. Justice Brennan in *Ker* indicate that a police officer's method of entry into a private residence, to arrest or to search, presents an issue of constitutional dimension. The decision in this case, like the decision in *Miller,* ultimately may rest on non-constitutional grounds—either the provisions of Section 3109 or the exercise of this Court's supervisory powers. But it is apparent that the policies which underlay the decision in *Miller* are derived from the same source as the Fourth Amendment protection

against unannounced entry which at least four Justices applied in *Ker*. We accordingly argue that our interpretation of the statute and defense of the agents' actions fully satisfy the Fourth Amendment's standard of reasonableness.

Beginning with the assumption that the Fourth Amendment affords a householder some protection against unannounced entries by the police, we submit that this right, like other Fourth Amendment rights, is qualified by the fact that the Amendment proscribes only unreasonable police conduct. If entry without announcement was not unreasonable in the circumstances of this case, petitioner's arrest was lawful, and the evidence seized incident to the arrest was properly admitted at trial. The right is further qualified by the long, common law evolution of the rule of announcement, which teaches that the rule is to be applied only to certain types of entries, determined by the degreee of force through which entry is achieved. Therefore, the reasonableness of the agents' failure to announce their authority before entering involves two related questions: whether the method of entry is of a type which, as a general rule, should require a prior announcement; and if so, whether there were exigent circumstances which excused the alleged failure to do so in the instant case.

1. The Fourth Amendment does not require an officer to give an announcement prior to entering through an unlocked door.

In *Miller* v. *United States, supra*, this Court, drawing on the concept of a right to privacy, held that the rule of announcement applied, as it did at common

law, to an entry which was achieved by forcing open a locked door. But the fact that considerations of privacy—as well as the avoidance of destruction and violence—are of some relevance here does not require one to ignore the differences between violent and non-forcible entries. The unannounced breaking of a lock—the only device whereby an ordinary person can secure his home from intrusion—is a type of police action which may be justified only by circumstances of compelling necessity. Society's interest in deterring this sort of police conduct outweighs its interest in securing the conviction of offenders by receiving the fruits of an otherwise lawful search. (We assume throughout this discussion that the purpose of the entry is to make an arrest, with a warrant or on probable cause, or to execute a search warrant.)

An unannounced entry by opening an unlocked door, however, does not present the same risks to individual privacy or to the general security of persons in their homes. A homeowner's failure to lock his door is not wholly fortuitous. It must be given some weight in determining the extent to which the homeowner has signified his intention to require persons who have reason to be on his premises to state their business before crossing his threshold. In the case of entry by an officer, moreover, the reason for his being on the premises is to perform a task in which society has such a significant interest that the homeowner is denied perhaps the most fundamental element of his privacy—the right to refuse admittance. When an individual leaves his door unlocked, the only advantage

which the rule of announcement could afford him is, in practical effect, an opportunity to be summoned to the door to be presented with a request which he has no right to refuse.

Petitioner argues, however (Br. 26), that the right to privacy will not admit a distinction between locked and unlocked doors for purposes of applying the rule of announcement, because, by merely closing the door, an individual "has signified his intention to enjoy the privacy of his home and to admit only those persons who are invited." This argument is based on the premise that the function of the rule of announcement is to establish the conditions for non-permissive entry, but as we have shown, the rule is concerned only with forcible entry. An officer armed with an arrest warrant or acting on probable cause derives his "invitation" from the State, and the homeowner may not refuse to admit him.

The decision in *Keiningham* v. *United States*, 287 F. 2d 126 (C.A.D.C.), cited by petitioner, demonstrates the error in his argument. In that case, the court interpreted the words "break open" in Section 3109 as meaning "enter without permission" (*id.* at 130). Under the court's rewording of the rule of announcement, it merely permits an officer to enter without the consent of the owner, after he has asked for and has been denied permission. The implication of the court's holding is that the rule would be violated every time an officer entered, even if the door was fully open, without first asking the consent of the owner. But this has never been the law.[9a] The sheriff did not derive

[9a] See, *e.g.*, *Lloyd* v. *Sandilands*, 8 Taunt. 250, 129 Eng. Rep. 379 (1879); *Commonwealth* v. *Tobin*, 108 Mass. 426 (1871).

his right to enter without consent from the rule of announcement; that right is inherent in the warrant. Except where force is to be applied, the failure to ask for consent is as immaterial as the failure to obtain it.

In short, it is apparent that the right to privacy plays a far more limited role where there is no right to refuse entry. In such circumstances, the "right" is at most a safeguard against police conduct which is needlessly and seriously alarming or provocative. The absence of any force or violence in effectuating the entry greatly detracts from this danger. Equally important, as we point out below, a failure to give forewarning may serve other interests which make it reasonable, in a particular case, to refrain from making an announcement.

2. In all events, the circumstances of the present case justified an entry without announcement

Even if the rule of announcement should be held to apply to entry through an unlocked door, the situation here required the officers to act with particular circumspection, and it was not unreasonable for them to fail to make an announcement. The opinions in *Ker* v. *California, supra,* recognized that the rule of announcement, viewed as a Fourth Amendment protection, is subject to certain exceptions. The opinion of Mr. Justice Clark quoted (374 U.S. at pp. 39–40) from the California Supreme Court's opinion in *People* v. *Maddox,* 46 Cal. 2d 301, 306, 294 P. 2d 6, 9:

> Moreover, since the demand and explanation requirements of section 844 are a codification of the common law, they may reasonably be

> interpreted as limited by the common law rules that compliance is not required if the officer's peril would have been increased or the arrest frustrated had he demanded entrance and stated his purpose. (*Read* v. *Case,* 4 Conn. 166, 170 [10 Am. Dec. 110]; see Rest., 2 Torts, § 206, com. d.) Without the benefit of hindsight and ordinarily on the spur of the moment, the officer must decide these questions in the first instance.[10]

The opinion of Mr. Justice Brennan (374 U.S. at 47) recognized that the failure to make an announcement would be excused

> (1) [W]here the persons within already know of the officers' authority and purpose, or (2) where the officers are justified in the belief that persons within are in imminent peril of bodily harm, or (3) where those within, made aware of the presence of someone outside (because, for example, there has been a knock at the door), are then engaged in activity which

[10] The California statute (Penal Code § 844, which is basically the same as 18 U.S.C. 3109) is regarded as a codification of the common law. The courts have held that compliance is not required if the circumstances show that the officer's peril would be increased or the arrest frustrated by demanding entrance and stating purpose. See also *People* v. *King*, 234 Cal. App. 2d 423, 44 Cal. Reptr. 500, certiorari denied, 384 U.S. 1026; *People* v. *Smith*, 63 Cal. 2d 799, 409 P. 2d 222; *People* v. *Potter*, 144 Cal. App. 2d 350, 300 P. 2d 889. A mere assertion that narcotics violators are normally on the alert to destroy incriminating evidence, however, is deemed insufficient to excuse announcement; the police must have some particular reason to enter in the manner chosen. *People* v. *Gastelo*, 432 P. 2d 706.

justifies the officers in the belief that an escape or the destruction of evidence is being attempted.

Other opinions have recognized that officers need not announce their purpose before conducting an otherwise authorized search if it would provoke the escape of the suspect or the destruction of critical evidence. *Katz* v. *United States,* 389 U.S. 347, 355 n. 16. Nor does the Fourth Amendment require officers to delay in the course of an investigation if to do so would endanger their lives or the lives of others. *Warden* v. *Hayden,* 387 U.S. 294, 298–299. See also Kaplan, *Search and Seizure—A No-Man's Land in the Criminal Law,* 49 Cal. L. Rev. 474, 502 (1961); Comment, *18 U.S.C. 3109—An Enigma in the Law of Search and Seizure,* 8 St. Louis U. L. J. 604 (1964); American Law Institute, *Restatement, Torts* (2d) § 206, comment d.

As noted at the outset of this argument, the circumstances preceding petitioner's arrest were developed at trial solely with reference to the claim that there was no probable cause for arrest. Since petitioner did not contend that the method of entry was improper, there was no reason for determining precisely whether there was a failure to make an announcement or for bringing out all of the facts which might have justified an unannounced entry. It is apparent, however, that the agents had exposed Jones to a substantial risk of harm if anything occurred to excite petitioner's suspicions. The electronic equipment, which was intended to be a lifeline to Jones, was itself a source of peril if, for any reason, it should be discovered. The potential danger to an untried

informer left little margin for error. After leaving Jones in the apartment with petitioner for about five minutes, the agents decided that they could not risk any further delay in making the arrest. The agents may have believed that petitioner's suspicions had been aroused by Jones, who testified that he was very nervous at the time. Announcement might have increased the danger to Jones and could also have put the officers themselves in peril. Whether or not the officers had a reasonable basis for belief that an emergency existed could well depend on facts not developed at trial because the issue was not raised. To the extent that the state of the record leaves the matter debatable, it suffices to say that petitioner is not entitled to benefit from his failure to make the claim of improper entry in the trial court.

II. THE ARREST WITHOUT A WARRANT WAS VALID

Petitioner sought and was granted a writ of certiorari to consider the following question, as stated in his petition (Pet. 2):

> May a federal law enforcement officer enter a private apartment dwelling to make an arrest by opening a closed but unlocked door without first giving notice of authority and purpose and being refused admittance as required by United States Code, Title 18, Section 3109.

He now seeks review, not only of that question, but also of the question whether the search was unlawful because (Br. 2):

> the arrest and the resultant search were made without a warrant of any kind, at night, after an unconsented to entry into petitioner's home,

under circumstances which do not excuse the officer's failure to obtain a warrant.

Rule 23.1(c) of the Rules of this Court provide that only the questions set forth in the petition or subsidiary questions fairly comprised therein will be considered. The question whether a warrant should have been obtained is not subsidiary to the question whether there must be announcement before entering private premises to make an arrest. Requirements of announcement are substantially the same whether the officers' entry is to execute a search warrant or to make an arrest upon probable cause. *Miller* v. *United States*, 357 U.S. 301. A question as to manner of entry necessarily presupposes a right to enter.

In all events, the agents' failure to obtain a warrant did not invalidate the arrest. Customs agents have statutory authority to make arrests for narcotics offenses on probable cause,[11] and petitioner does not appear seriously to contend that there was a lack of probable cause to arrest him. Since the search was incident to a lawful arrest, its validity does not depend upon the practicability of procuring a warrant. See *United States* v. *Rabinowitz*, 339 U.S. 56, 66. It is not necessary to determine whether there was sufficient basis for a finding of probable cause at the

[11] 26 U.S.C. 7607. That authority exists even if there was time to get a warrant. *Dailey* v. *United States*, 261 F. 2d 870, 872 (C.A. 5), certiorari denied, 359 U.S. 969; *United States* v. *Davis*, 281 F. 2d 93, 97 (C.A. 7), reversed on other grounds, 364 U.S. 505; *Abramson* v. *United States*, 326 F. 2d 565 (C.A. 5), certiorari denied, 377 U.S. 957; *United States* v. *Monroe*, 205 F. Supp. 175 (E.D. La.), affirmed, 320 F. 2d 277, certiorari denied, 375 U.S. 991.

time petitioner contends the agents should have sought a warrant for his arrest. Although Jones was an informer whose reliability had theretofore been untested, the telephone call to the person whose nickname and phone number were written on a card found in Jones' wallet tended to confirm his account of his arrangement with petitioner for transporting the cocaine across the border. But even if this evidence would not have justified the issuance of an arrest warrant, the failure to seek a warrant did not affect petitioner's rights. If the commissioner had found the evidence insufficient, the warrant would have been denied. Although this disposition would have protected petitioner from an immediate arrest, it would not have required the agents to terminate their investigation. They properly could have proceeded, as they did, to seek confirmation of Jones' information by permitting him to deliver the cocaine and by concealing a transmitter on his person so that they could listen to his conversation with petitioner. When the agents heard petitioner ask Jones whether he had his package and whether he got "through the line" all right, probable cause was clearly established. At this point, it was surely not practicable to seek a warrant or to delay petitioner's arrest. *Husty* v. *United States,* 282 U.S. 694, 701.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the writ should be dismissed as improvidently granted or, in the alternative, that the judgment of conviction should be affirmed.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 898

JOHNNY SABBATH,

Petitioner,

—v.—

UNITED STATES,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

In this Reply Brief petitioner will briefly comment upon some of the more important aspects in which the Government's Brief fails to meet the basic points urged in petitioner's opening Brief.

I.

The Government's Brief Does Not Detract From Petitioner's Argument That His Arrest Was Unlawful Because Federal Officers Entered His Apartment to Execute the Arrest by Opening a Closed but Unlocked Door Without First Announcing Their Authority and Purpose and Being Refused Admittance.

The thrust of the Government's argument is that the announcement requirement of 18 U.S.C. § 3109 applies only if federal officers seeking access to a private dwelling for the purpose of executing an arrest or conducting a search resort to "a violent forcing of locked doors." (R. Br. 11.)[1] This argument is based upon a narrow interpretation of the statute, and leads to a result which is wholly inconsistent both with the objectives served by the announcement requirement and with the weight of authority.

A. The Constitutional Underpinnings and Objectives of the Announcement Requirement Demand a Rejection of the Government's Position.

The Government's argument is based principally upon a mechanical and detached application of the general rule of statutory construction that words used by Congress should be given their "literal meaning" and should be "taken in their ordinary sense and according to the common understanding." (R. Br. 10.) In view of the fact that the announcement requirement of Section 3109 applies when the police "break open" the door or window of a house, the

[1] Throughout this Reply Brief, the Government's Brief will be designated "R. Br.", and petitioner's opening Brief will be designated "P. Br.".

Government then concludes that the requirement attaches only if the police make a *forcible* entry, since—so the argument goes—the ordinary and generally accepted definition of the words "break open" connotes the use of force.

Respondent's approach to the question of statutory construction involved in this case is overly simplified and ignores the overriding principle of statutory construction that the Court must "look to . . . [the statute's] objective and policy", and must seek a construction that does not produce incongruous results. *United States* v. *Boisdoré's Heirs*, 49 U.S. (8 How.) 113, 122 (1850); *NLRB* v. *Lion Oil Co.*, 352 U.S. 282, 288 (1957); see *United States* v. *Shirey*, 359 U.S. 255, 260-61 (1959). Judged by this standard, the weaknesses of the Government's argument are readily apparent.

Respondent concedes—as it must—that "a police officer's method of entry into a private residence, to arrest or to search, presents an issue of constitutional dimension". (R. Br. 18.) In view of that fact, this Court has recognized that the announcement requirement of Section 3109 "should not be given grudging application." *Miller* v. *United States*, 357 U.S. 301, 313 (1958). Yet, despite its concession and this Court's admonition, the Government urges a hypertechnical interpretation of the statute which would lead to absurdly incongruous results and would frustrate the objectives of the statute.

For example, if the "violent forcing of locked doors" were a prerequisite to the application of the announcement requirement—as the Government contends—the police would not be compelled to state their authority and purpose if they gained access to a private dwelling by peace-

fully unscrewing the hinges of a door or by using a high-powered magnet to shift a door bolt into an unlocked position, but the requirement presumably would apply if they entered by lightly pushing a partially opened door which was secured by a rusted and dilapidated chain hanging by a thread. Surely, Congress could not have intended that the constitutionally inspired protection from unannounced police intrusions into the sanctity of a person's house embodied in Section 3109 should depend upon artificial distinctions such as these. Indeed, in admitting that an unannounced entry gained "by opening a locked door with a passkey obtained without the owner's consent . . . presents a more difficult problem . . . and could be held to be a 'breaking' " (R. Br. 11), the Government acknowledges the difficulties inherent in attempting to apply its artificial and technical construction.

The complete bankruptcy of the Government's position is revealed by its attempt to reconcile the objectives of the announcement requirement contained in Section 3109 with its theory that the requirement obtains only when the police forcibly enter a private dwelling. Thus, with respect to the statutory objective of preserving the homeowner's constitutionally protected right to privacy, the Government suggests that, by failing to lock his door, the occupant of a home has forfeited his right "to require persons who have reason to be on his premises to state their business before crossing his threshold". (R. Br. 20.) Apparently, the Government would therefore equate the Fourth Amendment rights of a homeowner who has failed to lock his door with those of a shopkeeper whose premises are open to the public. Surely, as was indicated in petitioner's opening Brief (P. Br. 25-26, 34-37), any such notion of forfeiture is incon-

sistent with this Court's recognition that "a man's house is his castle", *Miller* v. *United States*, 357 U.S. 301, 307 (1958), and that "at the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there to be free from unreasonable governmental intrusion". *Silverman* v. *United States*, 365 U.S. 505, 511 (1961).

Nor does respondent offer a satisfactory explanation for the distinction between locked and unlocked doors in terms of the statutory objective of minimizing the violence which frequently accompanies unannounced intrusions into private dwellings. The Government's only response is the *ipse dixit* that "the absence of any force or violence in effectuating the entry greatly detracts from this danger." (R. Br. 22.) This assertion is supported neither by authority nor by logic. As Mr. Justice Jackson recognized in *McDonald* v. *United States*, 335 U.S. 451, 460-61 (1948) (concurring opinion), any uninvited and unannounced entry into a private dwelling is fraught with danger both to the occupant of the house and to the police. A plainclothes policeman who stealthily enters through the unlocked door of an apartment is just as likely to be mistaken for a burglar and to elicit a violent response as is the officer who shatters a locked door or utilizes a passkey.

The fact of the matter is that respondent would denigrate completely the importance of the objectives which underlie the announcement requirement, as is indicated by its statement that the only advantage of the requirement is to afford "an opportunity to be summoned to the door to be presented with a request which he [the occupant] has no right to refuse". (R. Br. 20-21.) This over-simplified characterization of the requirement ignores the fundamental sig-

nificance of the summons to the door and the announcement of the officer's authority and purpose. As indicated in petitioner's opening Brief (P. Br. 24-28), the announcement pays due regard to the occupant's Constitutional right of privacy; it comports with the presumption of innocence which every citizen enjoys; and it reduces the risk of violence attendant upon an unannounced entry into a private dwelling.

B. Neither the Common Law Nor the Weight of Modern Judicial Precedents Is Contrary to Petitioner's Position.

The Government argues that its interpretation of the words "break open" in Section 3109 finds support in the common law, and it relies principally upon a dictum in *Semayne's Case,* 5 Co. Rep. 91a, 77 Eng. Rep. 194 (1603), to support the argument.[2] However, the fact is, as conceded by the Government (R. Br. 13), that no English case appears to have dealt specifically with the question whether

[2] In *Semayne's Case,* the court was addressing itself only to the questions of when a breaking by a sheriff is permissible, and whether an announcement must be made prior to such a breaking. At different points in the opinion, the court utilized seemingly inconsistent language with respect to the use of force as a prerequisite to the announcement requirement. For example, in expressing concern for the convenience of the dweller of the house, 77 Eng. Rep. at 195-96, the court's comments clearly implied that the sheriff must announce his authority and purpose regardless of whether the door was locked or unlocked. Thus, it indicated that a breaking sufficient to invoke the announcement requirement occurred "if the doors be not open," *id.* at 195, or if the owner has simply "shut the door of his own house." *Id.* at 199. On the other hand, there is language in the opinion which—as the Government suggests (R. Br. 12)—implies that a breaking requires the use of force. *Id.* at 196. Little weight should be placed on the court's apparently conflicting language, particularly since the issue involved in this case was neither before that court nor a matter to which it specifically directed its attention.

an officer may lawfully make an unannounced entry through a closed but unlocked door.

To the extent that the common law is relevant, it lends credence to petitioner's position because it clearly and unambiguously recognized the inviolability of a person's dwelling and established a broad prohibition against unwarranted intrusions into the home. (See P. Br. 19.) Thus, even though the English judges recognized that circumstances might warrant the sheriff's breaking into a private dwelling to make an arrest, they were careful to place limitations upon the sheriff's authority—the principal one being the announcement requirement which is embodied in Section 3109. See *Semayne's Case*, 5 Co. Rep. 91a, 77 Eng. Rep. 194, 195-96 (1603). Surely, judges who placed so high a premium upon the sanctity of the home would not have applied the announcement requirement in the niggardly fashion urged by the Government.

Indeed, it is precisely because the announcement requirement was designed as a safeguard for individual liberty that it should be given the broadest possible application. For this reason, it is entirely appropriate that the state courts and commentators have drawn upon the broad definition of "breaking" in the law of burglary to determine what constitutes a breaking by a police officer. (See authorities cited in P. Br. 21-24.)[3] Their approach is con-

[3] Respondent seeks to distinguish these cases on the ground that they involved the entry of a policeman to execute civil process, and not to make an arrest. In petitioner's view, this distinction is irrelevant. The overriding consideration with respect to both the burglar and the police officer—which the Government ignores—is that society's high regard for the sanctity of the home furnishes the common ingredient for establishing a broad definition of what constitutes a "breaking." In the case of the burglar, such a definition protects the citizen from any felonious attempt to enter his house. In the case of the police officer, a broad definition protects the

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sistent with this Court's ruling that, when the rights of an occupant of a home are involved, the term "breaking" should be interpreted as encompassing the mere opening of an unlocked means of entry. *Chapman* v. *United States*, 365 U.S. 610, 616 (1961).

In petitioner's view, the rights and safety of the homeowner, and the security of an arresting officer can be fully protected only if this Court concludes that "'the word 'break,' as used in 18 U.S.C. § 3109, means 'enter without permission','" and that the word is not limited merely to an entry which results "in a breaking of parts of the house." *Keiningham* v. *United States*, 287 F.2d 126, 130 (D.C. Cir. 1960).

C. The Officers' Failure to Announce Their Authority and Purpose Before Entering Petitioner's Apartment Was Not Justified by Any "Exigent Circumstances".

Respondent urges that, if the announcement requirement of Section 3109 does apply to entry through a closed but unlocked door, "the circumstances of the present case justified an entry without announcement." (R. Br. 22.)[4]

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citizen from the fright and violence which may result from an unannounced police intrusion into his home. In both cases, the broad definition serves to safeguard the citizen's right to remain secure in his home.

[4] The Government also suggests that the state of the Record concerning the agents' entry into petitioner's apartment is incomplete, and that it is possible that the officers actually did satisfy the announcement requirement. (R. Br. 8-9.) Although the agents were not specifically asked whether they announced their authority and purpose before entering, the following, detailed description by the agent in charge of what transpired at the time of entry leaves little room for the Government's supposition:

> "I knocked on the door, waited a few seconds, and no answer came from within, so I opened the unlocked door and came into the apartment." (R. 21.)

This Court has indicated that it is an open question whether federal officers may excuse their failure to comply with the announcement requirement of Section 3109 because of the existence of so-called "exigent circumstances." *Miller* v. *United States*, 357 U.S. 301, 309 (1958). See also *Wong Sun* v. *United States*, 371 U.S. 471, 482 (1963). Assuming *arguendo* that the announcement requirement of Section 3109 may be excused under appropriate circumstances, the fundamental objectives served by that mandate necessitate that the scope of the exception be carefully limited. See *Miller* v. *United States*, 357 U.S. 301, 313 (1958); *Ker* v. *California*, 374 U.S. 23, 47 (1963) (dissenting opinion).

As indicated in petitioner's opening Brief (P. Br. 20), the facts of this case do not fall within any of the categories of "exigent circumstances" which the majority and dissenting opinions in *Ker* recognized as appropriate bases for excusing failure to comply with the requirement when it is applied as a Constitutional mandate in state prosecutions.

The Government speculates that the officers' conduct in this case was justified by their fear that "announcement might have increased the danger to Jones and could have also put the officers themselves in peril." (R. Br. 25.) However, there is not one shred of evidence in the Record to support this conjecture. Having failed to conduct any independent investigation, the agents had no reason to suspect that petitioner was armed, or that on the basis of prior behavior he might attempt to resist arrest. Nor did the officers hear anything over the electronic transmitter attached to Jones, or through the door, which could have conceivably justified any fear on their part that Jones was

in imminent peril. Indeed, contrary to the Government's assertion that the transmitter was "intended to be a life-line to Jones" (R. Br. 24), a fair reading of the Record suggests that the principal purpose of that device was to obtain a "recording" of any incriminating statements which petitioner might make (R. 26). It was only after the agents were frustrated in that objective that they "decided it was time to go into the apartment." (R. 21, 26.)

While it is true that the officers were not specifically asked to explain their failure to make the required announcement, there was substantial testimony concerning the circumstances and events which led to their breaking into petitioner's apartment. (R. 20-21, 25-26, 45-46.) If, in fact, an apprehension over Jones' safety was a motivating consideration, it is reasonable to assume that the officers would have mentioned that in the course of their detailed description of the circumstances surrounding their entry into the apartment. The Record is barren of any such testimony.

The fact is that the agents had virtually complete control of the situation. They chose the timing, the manner and place of petitioner's arrest, and it was they who sent Jones into petitioner's apartment. Having created the circumstances under which petitioner was arrested, the officers should not be permitted to rely upon those circumstances to excuse their failure to comply with the announcement requirement of Section 3109—particularly in the absence of any specific evidence indicating that Jones was in peril. Any other conclusion might facilitate—or even encourage—police practices in conflict with the objectives of the statutory requirement of announcement.

II.

The Government's Brief Fails to Rebut Petitioner's Contention That His Arrest Was Unlawful Because of the Officers' Failure to Obtain a Warrant of Any Kind Under Circumstances Which Required Them to Do So.

In response to petitioner's argument that his arrest was unlawful because it was executed without a warrant, at night, in his home, after an unannounced, unconsented to entry by the police, the Government offers two arguments. First, it asserts that the warrantless arrest was authorized by 26 U.S.C. § 7607.[5] Second, it contends that at the time the officers obtained adequate evidence to establish clearly that probable cause existed, "it was . . . not practicable to seek a warrant or to delay petitioner's arrest." (R. Br. 27.) Neither of these arguments is persuasive.

Although 26 U.S.C. § 7607 does authorize narcotics agents to "make arrests without warrant" upon probable cause, the principal purpose of the statute was to confer upon narcotics agents the same general arresting authority which other federal law enforcement officers possess. See

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[5] That statute provides, in pertinent part, as follows:

> "The Commissioner, Deputy Commissioner, Assistant to the Commissioner, and agents, of the Bureau of Narcotics of the Department of the Treasury, and officers of the customs (as defined in section 401 *(1)*, of the Tariff Act of 1930, as amended; 19 U.S.C., sec. 1401*(1)*), may—
>
> • • •
>
> "(2) make arrests without warrant for violations of any law of the United States relating to narcotic drugs (as defined in section 4731) or marihuana (as defined in section 4761) where the violation is committed in the presence of the person making the arrest or where such person has reasonable grounds to believe that the person to be arrested has committed or is committing such violation."

Miller v. *United States*, 357 U.S. 301, 305 (1958); Hearings Before the Subcommittee on Narcotics of the House Ways and Means Committee, 89th Cong., 2d Sess., 7, 8 (1956); compare 18 U.S.C. § 3052. It is clear that the authority of narcotics agents to execute warrantless arrests is governed by the same Fourth Amendment criteria that apply to other federal police officers. *Wong Sun* v. *United States*, 371 U.S. 471, 478, n. 6 (1963); *United States* v. *Smith*, 308 F.2d 657, 661 (2d Cir. 1962), *cert. denied*, 372 U.S. 906 (1963).

Accordingly, the mere fact that Congress has given narcotics agents general authorization to make arrests without warrant is not dispositive of the question whether, under the circumstances of this case, petitioner's arrest was lawful. As noted in petitioner's opening Brief (P. Br. 33-34), this Court has already acknowledged that "the forceful nighttime entry into a dwelling to arrest a person reasonably believed within upon probable cause that he had committed a felony, under circumstances where no reason appears why an arrest warrant could not have been sought" raises a "grave constitutional question." *Jones* v. *United States*, 357 U.S. 493, 499-500 (1958). That question is not resolved by a facile reference to the general provisions of Section 7607. Nor is it resolved by the invocation of authorities (R. Br. 26) which involved factual situations substantially different from the circumstances surrounding petitioner's arrest.

In addition, it simply begs the question to assert, as the Government does, that it was impractical for the officers to have sought a warrant after Jones had entered petitioner's apartment.* This claim overlooks the signifi-

* The Government contends that the officers clearly had probable cause only at that time, when, by means of the transmitter carried

cant fact that the officers were in complete control of the timing and place of the arrest, and that they had failed to engage in any substantial independent investigation which would have supported an application for a warrant prior to their arrival at petitioner's apartment. It also ignores the numerous alternatives available to the police which would have been more consistent with the warrant procedure. (See P. Br. 37-38.)

In short, by ignoring these salient facts and by relying upon the so-called—and self-imposed—impracticality of obtaining a warrant, the Government urges a result which would emasculate the warrant procedure. In view of the fundamental importance of that procedure (see P. Br. 34-44), the officers' conduct under the circumstances of this case should not be condoned by the Court.

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by Jones, they heard "petitioner ask Jones whether he had his package." (R. Br. 27.) This assertion distorts the Record. The testimony of the officer in charge of the arrest establishes that the police were unable to determine whether Jones or petitioner had mentioned the word "package," or to ascertain what petitioner's comments during that portion of the conversation were. He testified as follows:

> "Well, I, I heard a part of a conversation; something about—package. I heard the word 'package' mentioned, and I heard a reply.
>
> "This, this is about all I could gather from that; but I definitely heard the word 'package' *from one voice*, and the other voice replied something, but the music again was fairly loud and I could not exactly make it out." (R. 21) (Emphasis supplied.)

Conclusion

For reasons stated in petitioner's opening Brief and in this Reply Brief, the judgment of the Court of Appeals should be reversed, and petitioner's conviction should be set aside.

Respectfully submitted,

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April 1968

OPINION

SUPREME COURT OF THE UNITED STATES

No. 898.—October Term, 1967.

Johnny Sabbath, Petitioner, v. United States. | On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[June 3, 1968.]

Mr. Justice Marshall delivered the opinion of the Court.

The issue in this case is whether petitioner's arrest was invalid because federal officers opened the closed but unlocked door of petitioner's apartment and entered in order to arrest him without first announcing their identity and purpose. We hold that the method of entry vitiated the arrest and therefore that evidence seized in the subsequent search incident thereto should not have been admitted at petitioner's trial.

On February 19, 1966, one William Jones was detained at the border between California and Mexico by United States customs agents, who found in his possession an ounce of cocaine. After some questioning, Jones told the agents that he had been given the narcotics in Tijuana, Mexico, by a person named "Johnny," whom he had accompanied there from Los Angeles. He said he was to transport the narcotics to "Johnny" in the latter city.

Also found in Jones' possession was a card on which was written the name "Johnny" and a Los Angeles telephone number. On the following day at about 3 p. m., Jones made a call to the telephone number listed on the card; a customs agent dialed the number, and with Jones' permission, listened to the ensuing conversation. A male voice answered the call, and Jones addressed the man as "Johnny." Jones said he was in San Diego, and still had

"his thing." The man asked Jones if he had "any trouble getting through the line." Jones replied that he had not. Jones inquired whether "Johnny" planned to remain at home, and upon receiving an affirmative answer, indicated that he was on his way to Los Angeles, and would go to the man's apartment.

At about 7:30 that evening, the customs agents went with Jones to an apartment building in Los Angeles. The agents returned to Jones the cocaine they had seized from him, and placed a small broadcasting device on him. The agents waited outside the building, listening on a receiving apparatus. Jones knocked on the apartment door; a woman answered. Jones asked if "Johnny" was in, and was told to wait a minute. Steps were heard and then a man asked Jones something about "getting through the line." Because of noise from a phonograph in the apartment, reception from the broadcasting device on Jones' person was poor, but agents did hear the word "package."

The customs agents waited outside for five to 10 minutes, and then proceeded to the apartment door. One knocked, waited a few seconds, and, receiving no response, opened the unlocked door, and entered the apartment with his gun drawn. Other agents followed, at least one of whom also had his gun drawn. They saw petitioner sitting on a couch, in the process of withdrawing his hand from under the adjacent cushion. After placing petitioner under arrest, an agent found the package of cocaine under the cushion, and subsequently other items (*e. g.*, small pieces of tin foil) were found in the apartment; officers testified at trial they were adapted to packaging narcotics.

Petitioner and Jones were indicted for knowingly importing the cocaine into this country and concealing it, in violation of 21 U. S. C. §§ 173 and 174. Petitioner was tried alone. The narcotics seized at petitioner's

apartment was admitted into evidence, over objection. On appeal, following the conviction, the Court of Appeals for the Ninth Circuit ruled that the officers, in effecting entry to petitioner's apartment by opening the closed but unlocked door, did not "break open" the door within the meaning of 18 U. S. C. § 3109 and therefore were not required by that statute to make a prior announcement of "authority and purpose." 380 F. 2d 108. We granted certiorari, 389 U. S. 1003 (1967), to consider the somewhat uncomplicated but nonetheless significant issue of whether the agent's entry was consonant with federal law.[1] We hold that it was not, and therefore reverse.

The statute here involved, 18 U. S. C. § 3109,[2] deals with the entry of federal officers into a dwelling in terms only in regard to the execution of a search warrant. This Court has held, however, that the validity of such an entry of a federal officer to effect an arrest without a warrant "must be tested by criteria identical to those embodied in" that statute. *Miller* v. *United States*, 357

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[1] The Government contends in this Court that petitioner did not adequately raise at trial the issue of the agents' manner of entry, and therefore that it did not have sufficient opportunity to indicate the full circumstances surrounding the entry and petitioner's arrest. However, petitioner's trial counsel, in the course of objecting, clearly stated there were no facts "sufficient to justify this officer's breaking into" the apartment, and his objection was truncated by a ruling of the trial judge. In any event, the Government met the issue on the merits in the Court of Appeals, and apparently did not there contend the record was inadequate for its resolution; and the Court of Appeals decided the issue on the merits. In these circumstances, we are justified in likewise doing so.

[2] "The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant."

U. S. 301, 306 (1958); *Wong Sun* v. *United States*, 371 U. S. 471, 482–484 (1963).[3] We therefore agree with the parties and with the court below that we must look to § 3109 as controlling.

In *Miller* v. *United States*, *supra*, the common law background to § 3109 was extensively examined.[4] The Court there concluded, *id.*, at 303:

> "The requirement of prior notice of authority and purpose before forcing entry into a home is deeply rooted in our heritage and should not be given grudging application. Congress, codifying a tradition embedded in Anglo-American law, had declared in § 3109 the reverence of the law for the individual's right of privacy in his house."

It was also noted, *id.*, at 313, n. 12, that another facet of the rule of announcement was, generally, to safeguard officers, who might be mistaken, upon an unannounced intrusion into a home, for someone with no right to be there. See also *McDonald* v. *United States*, 335 U. S. 451, 460–461 (concurring opinion).

Considering the purposes of § 3109, it would indeed be a "grudging application" to hold, as the Government urges, that the use of "force" is an indispensable element of the statute. To be sure, the statute uses the phrase "break open" and that connotes some use of force. But linguistic analysis seldom is adequate when a statute is designed to incorporate fundamental values and the ongoing development of the common law.[5] Thus, the

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[3] See also, *e. g.*, *Ng Pui Yu* v. *United States*, 352 F. 2d 626, 631 (C. A. 9th Cir. 1965); *Gatlin* v. *United States*, 117 U. S. App. D. C. 123, 130, 326 F. 2d 666, 673 (C. A. D. C. Cir. 1963); *United States* v. *Cruz*, 265 F. Supp. 15, 21 (W. D. Tex. 1967).

[4] See also *Ker* v. *California*, 374 U. S. 23, 47–59 (1963) (opinion of BRENNAN, J.).

[5] While distinctions are obvious, a useful analogy is nonetheless afforded by the common and case law development of the law of

California Supreme Court has recently interpreted the common-law rule of announcement codified in a state statute identical in relevant terms to § 3109 to apply to an entry by police through a closed but unlocked door. *People* v. *Rosales*, 68 Cal. 2d —, 437 P. 2d 489 (1968). And it has been held that § 3109 applies to entries effected by the use of a passkey,[6] which require no more force than does the turning of a doorknob. An unannounced intrusion into a dwelling—what § 3109 basically proscribes—is no less an unannounced intrusion whether officers break down a door, force open a chain lock on a partially open door, open a locked door by use of a passkey, or, as here, open a closed but unlocked door.[7] The protection afforded by, and the values inherent in, § 3109

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burglary: a forcible entry has generally been eliminated as an element of that crime under statutes using the word "break," or similar such words. See R. Perkins, Criminal Law 149–150 (1957); J. Michael & H. Wechsler, Criminal Law and Its Administration 367–382 (1940); Note, A Rationale of the Law of Burglary, 51 Col. L. Rev. 1009, 1012–1015 (1951). Commentators on the law of arrest have viewed the development of that body of law as similar. See H. Voorhees, Law of Arrest §§ 159, 172–173 (1904); Wilgus, Arrest Without a Warrant, 22 Mich. L. Rev. 798, 806 (1924):

"What constitutes 'breaking' seems to be the same as in burglary: lifting a latch, turning a doorknob, unhooking a chain or hasp, removing a prop to, or pushing open, a closed door of entrance to the house,—even a closed screen door . . . is a breaking . . . ." (Footnotes omitted.)

See generally Blakey, The Rule of Announcement and Unlawful Entry, 112 U. Pa. L. Rev. 499 (1964).

[6] See, *e. g.*, *Munoz* v. *United States*, 325 F. 2d 23, 26 (C. A. 9th Cir. 1963); *United States* v. *Sims*, 231 F. Supp. 251, 254; cf. *People* v. *Stephens*, 249 Cal. App. 2d 113, 57 Cal. Rptr. 66 (1967). See also *Ker* v. *California*, 374 U. S., at 38.

[7] We do not deal here with an entries obtained by ruse, which have been viewed as involving no "breaking." See, *e. g.*, *Smith* v. *United States*, 357 F. 2d 486, 488 n. 1 (C. A. 5th Cir. 1966); *Leahy* v. *United States*, 272 F. 2d 487, 489 (C. A. 9th Cir. 1960). See also Wilgus, n. 5, *supra*, at 806.

must be "governed by something more than the fortuitous circumstance of an unlocked door." *Keiningham* v. *United States*, 109 U. S. App. D. C. 272, 276, 287 F. 2d 126, 130 (1960).

The Government seeks to invoke an exception to the rule of announcement, contending that the agents' lack of compliance with the statute is excused because an announcement might have endangered the informant Jones or the officers themselves. See, *e. g.*, *Gilbert* v. *United States*, 366 F. 2d 923, 931 (C. A. 9th Cir. 1966), cert. denied, 388 U. S. 922 (1967); cf. *Ker* v. *California*, 374 U. S. 23, 39–40 (1963) (opinion of Clark, J.); *id.*, at 47 (opinion of BRENNAN, J.). However, whether or not "exigent circumstances," *Miller* v. *United States*, *supra*, at 309, would excuse compliance with § 3109, this record does not reveal any substantial basis for excusing the failure of the agents here to announce their authority and purpose. The agents had no basis for assuming petitioner was armed or might resist arrest, or that Jones was in any danger. Nor, as to the former, did the agents make any independent investigation of petitioner prior to setting the stage for his arrest with the narcotics in his possession.

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

Reversed and remanded.

MR. JUSTICE BLACK dissents.

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[8] Exceptions to any possible constitutional rule relating to announcement and entry have been recognized, see *Ker* v. *California*, *supra*, at 47 (opinion of BRENNAN, J.), and there is little reason why those limited exceptions might not also apply to § 3109, since they existed at common law, of which the statute is a codification. See generally Blakey, n. 5, *supra*.